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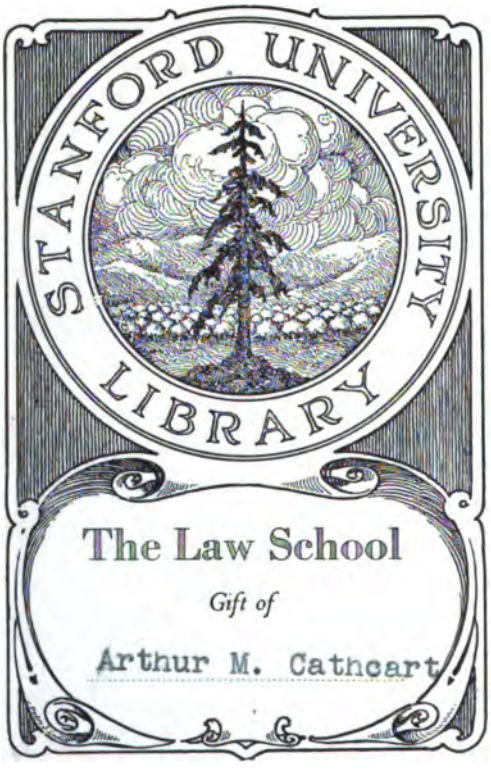
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CASES

ON

BAILMENTS, CARRIERS AND PUBLIC CALLINGS

HUGH EVANDER WILLIS
Professor of Law in University of Minnesota

MINNEAPOLIS
THE H. W. WILSON COMPANY
1913

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PREFACE

This case book covers "Bailments," "Carriers," and "Public Callings." Each of these subjects is frequently (eg. Harvard) covered by a separate case book. A great many schools desire a separate course on Bailments & Carriers, or on Bailments, Carriers and Public Callings; but not many schools will desire to ask their students to purchase three, or even two, books thereon. It is hoped this book will meet the needs of such schools.

The topics of liens and actions, which are treated very fully by Prof. Gray, are only given sufficient treatment herein in cases and notes to round out the subject of Bailments. For further treatment of these topics the student is referred to the case books on property. The topics covered by standard case books on Carriers are covered in this book in the chapters on common carriers. Emphasis throughout this book, however, is laid upon the rapidly growing and interesting subject of Public Callings.

The cases selected give the historical development of the law of Bailments and Public Callings, and set forth fully their fundamental principles. In addition to the cases, there are inserted in the book, a few readings from law articles by Ames, Beale, Wyman, Wigmore, and others. There are also the usual supplemental notes and annotations, together with editing of the cases.

H. E. W.

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BAILMENTS, CARRIERS AND PUBLIC CALLINGS

CHAPTER I.

EARLY LAW OF BAILMENTS

STREET: FOUNDATIONS OF LEGAL LIABILITY, Vol. II. pp. 252-257.

The old French word bailler, from which bailment is derived, means to deliver, and the term itself points us to the most characteristic features of our modern bailment, viz., the necessity * * * of a deliverable thing and that, in pure bailments there should be in fact a delivery of it by the bailor to the bailee with the intention of giving him possession. * * *

In all bailments possession is severed from ownership. Under the theory of the common law, every bailee has true possession as distinguished from mere custody. * * *

Where a transaction of any kind results in a bailment, there can be no question but that the bailee ought to deliver up the object when the purpose of the bailment is accomplished. The bailee then owes the object to its owner. This, the first and most conspicuous duty of the bailee, was of course recognized in our early law almost before it reached the state of articulate utterance. The proper action for the bailor to bring in order to enforce this duty was the action of debt in the debet et detinet. * * * If the defendant refused to surrender the chattel, only so much of the judgment as gave a moneyed decree could be enforced. There was no perfect action in rem by which the bailor could recover the actual thing itself when still existent.

It is characteristic of law in its early stages that it recognizes a broad duty and enforces it. * * * In English law the duty of the bailee to restore was rigorously enforced. * * * In

conformity with the principle of strict liability * * * the bailee was held liable where his possession was invaded by a wrongdoer who destroyed or carried away the chattel bailed. In other words, robbery or theft from the bailee was not available by him as a defense. * * * The bailee was treated as a debtor. He owed the chattel or its value to the bailor, and the unpreventable loss of it was his misfortune.[1] * * *

Thus Glanvil, writing near the end of the twelfth century, after telling us that a debt arises when an object is lent gratuitously to a borrower to be made use of by him, says that the service being finished, the borrower is bound to restore the chattel without deterioration if it be in existence. But if the thing itself be destroyed, or has by any means been lost while in the custody of the borrower, he is absolutely bound to return a reasonable price. * * * The principle here laid down is stated concerning gratuitous loans. * * * There can be little doubt, however, that strict accountability was the general rule of law.

Bracton, writing near the middle of the thirteenth century, evidently stated the law more favorably to bailees than the common law of that day justified. * * * Bracton, of course, borrowed largely from the Digests and Institutes of Justinian. But his effort to ingraft on our law the Roman distinctions as to the varying degrees of diligence due from bailees under different circumstances, was too premature. * * * In a generation or two we apparently begin to see the ameliorating effects of his ideas. Britton, writing about A. D. 1287 and giving currency to Bracton's views, says that where anything is borrowed to be restored on a certain day, the debtor is bound to restore to the creditor the thing borrowed in as good condition, or better, than it was received, or else its value, unless by accident of fire, water, robbery, or larceny, restoration has become impossible; for, says he "against such accidents no one ought to answer for things lost, unless they happen by his own fault or negligence."[2] * * *

[1] Holmes, Common Law, 164 et seq. But see, 11 Harv. L. Rev. 159.

[2] (The actions which the common law gave the bailor were (1) detinue against the bailee; (2) detinue against anyone in possession; (3) trespass against a stranger; (4) account against the bailee; (5) case against the bailee.—(a) trover except when the bailee was merely careless, (b) trespass on the case for negligent misfeasance, (c) assumpsit for negligent non-feasance. Of these actions, detinue became available about 1150 A. D., trespass, and account about 1250 A. D., case, about 1450 A. D., trover, trespass on the case and assumpsit, about 1550 A. D. Ed.)

SELECT CIVIL PLEAS (SELDEN SOC.), Pl. 8.

(1200 A. D.)

[1] John Maltravers demands against Walter de Turberville and Alice his wife two charters of King Henry the grandfather and one of our lord King John, and one charter of the Earl of Striguil, which Alice had in her keeping; and Walter de Turberville comes and admits that he had those charters, but he says that they were stolen from them and burnt when his house was burnt, whereof he appealed [prosecuted] the burners of his house, (and) whereof the said John was appealed. [2] And he, John, demands against them five breast-plates, which they unjustly detain, (and) which belonged to John his father. And Walter defends that they never had those breast-plates, and that John, the father of said John, had no breast-plate but one only, which he gave to a certain son of his, with ten librates of land, in the seventh year before his death. And John comes and says that his father had those five breast-plates in a certain Welsh war, and was bound by the tenure of his land to have them; and he produces sufficient suit thereof, to wit, Reginald de Argentine, who saw them; and he craves that it may be allowed in his favor that Walter admits that he had the charters, and that they were lost under his charge after that (John) brought him in the plea. (i. e. after the commencement of the action.) It is considered that Walter shall be (here) on the morrow of S. Michael to hear his judgment touching the breast-plates, and the judgment touching the charters at the same term. And then Walter essoined [excused] himself, and was not essoined because he withdrew without license; and he did not wait for his judgment; and he was attached, and did not come. Therefore it is considered that John has deraigned [justified] his breast-plates by default, also the complaint of his charters.[1]

[1]In "Bonion's Case (1315), (Y. B. 8 Edw. II, 275), the plaintiff brought detinue to recover certain seals, plate and jewels which had been delivered to the defendant for keeping. The latter alleged that the plaintiff had delivered the jewels in a locked chest, the key to which was taken away by the plaintiff without giving information as to the contents. Subsequently robbers came by night and carried off the chest into the field, where they forced the lock and abstracted the contents. At the same time the defendant was robbed of his own goods. * * * The plaintiff replied that the jewels were delivered in a chest not locked, which was to be restored at the pleasure of

THE MARSHAL'S CASE, Y. B. 33 Hen. VI. 1, pl. 3.[1]

(1455)

This was an action against the marshal of the King's Bench for the escape of a prisoner committed under a judgment in favor of the plaintiff, and it was pleaded that enemies of the king broke open the prison and carried off the prisoner against the marshal's will, but without stating who or of what country they were. (It seems jailers in charge of prisoners were governed by the same law as bailees in charge of cattle; that is, the body of the prisoner was delivered to be kept. Ed.)

CHOKE: If enemies from France or other enemies of the King were here, the marshal would be discharged: as if they had burned the house of a tenant for life, he should be discharged of waste; or otherwise if the house were burned by a sudden tempest, then he would be discharged; so here.

DANBY, J. In your case of the king's enemies and of the sudden tempest it is right; for then there was no remedy against anyone; but it is otherwise where subjects of the king do it; for there you have action against them.

CHOKE: Sir, the captain is dead, and all the others are unknown.

PRISOT, C. J. If they were subjects of the king, they could not be called enemies of the king, but traitors; for enemies are those who are out of his allegiance; but if they were alien enemies it would be a good plea without any doubt. But if there were twelve or twenty subjects of the king, and unknown, and one night they broke open the prison and took them out, etc., in that case the marshal shall be charged for his negligent guard; so here. But if it were by a sudden accident with fire, and the prison were burned, and they escaped, perhaps it is otherwise.

CHOKE: Then we say that there were 4,000 Scots and other enemies of the king with the other traitors, etc.

the bailor. On this allegation issue was joined. In other words the defendant was to be discharged provided he could make good the assertion that the jewels were delivered in a locked chest. * * * The distinction recognized in Bonion's Case is perhaps a rather specious one, but it served the end of justice, and sufficed to take the case out of the operation of the principle which made the bailee absolutely liable." 2 Street, Found. Leg. Lia. 257.

[1] Beale's Cases on Carriers.

DANBY, J. Then you ought to allege the matter more specially, and some of their names. Et adjournatur."

WOODLIFE'S CASE, (Q. B.) Owen, 57.

(1596)

In an account the plaintiff declared, that he delivered goods to the defendant to merchandise for him; the defendant said, that the goods with divers other of his own proper goods were taken at sea, where he was robbed of them. And it was moved that this was no plea in bar of an account, but, if it be any plea, it shall be a plea before auditors in discharge; but admitting it be a good bar, yet it is not well pleaded, for the plaintiff as it is pleaded cannot traverse the robbing and try it, for things done super altum mare are not tryable here, wherefore the defendant ought to have pleaded that he was robbed at London, or any other certain place upon the land, and maintain it by proofs that he was robbed on the sea.

GAWDY. It is no good plea, for he hath confest himself to be accountable by the receipt, 9 Edw. IV, and it is no plea before auditors, no more than the case was in 9 Edw. IV, for a carrier to say that he was robbed.

POPHAM. It is a good plea before auditors, and there is a difference between carriers and other servants and factors; for carriers are paid for their carriage, and take upon them safely to carry and deliver the things received.

GAWDY. If rebels break a prison, whereby the prisoners escape, yet the gaoler shall be responsible for them, as it is in the 33 Hen. VI.

POPHAM. In that case the gaoler hath remedy over against the rebels, but there is no remedy over in our case.

GAWDY. Then the diversity is when the factor is robbed by pyrates, and when by enemies.

POPHAM. There is no difference.

SOUTHCOTE'S CASE, (K. B.), 4 Coke, 83 b.

(1601)

Southcote brought detinue against Bennet for certain goods, and declared, that he delivered them to defendant to keep safe;

the defendant confessed the delivery, and pleaded in bar that after the delivery one J. S. stole them feloniously out of his possession: the plaintiff replied that the said J. S. was the defendant's servant retained in his service, and demanded judgment, &c. And thereupon the defendant demurred in law, and judgment was given for the plaintiff: and the reason and cause of their judgment was, because the plaintiff delivered the goods to be safe kept, and the defendant had took it upon him by the acceptance upon such delivery, and therefore he ought to keep them at his peril, although in such case he should have nothing for his safe keeping. So if A delivers goods to B generally to be kept by him, and B accepts them without having anything for it, if the goods are stole from him, yet he shall be charged in detinue; for to be kept and to be kept safe, is all one. But if A accepts goods of B to keep them as he would keep his own proper goods, there, if the goods are stolen, he shall not answer for them: or if goods are pawned or pledged to him for money, and the goods are stolen, he shall not answer for them, for there he doth not undertake to keep them but as he keeps his own; for he has a property in them and not a custody only, and therefore he shall not be charged as it is adjudged in 29 Ass. 28. But if before the stealing he who pawned them tendered the money, and the other refused, then there is fault in him; and then the stealing after such tender, as it is there held, shall not discharge him: so if A delivers to B a chest locked to keep, and he himself carries away the key, in that case if the goods are stolen, B shall not be charged, for A did not trust B with them, nor did B undertake to keep them, as it is adjudged in 8 E. 2. Detinue 59. So the doubt which was conceived upon sundry different opinions in our books, in 29 Ass. 28. 3 H. 7. 4. 6 H. 7. 12. 10 H. 7. 26. of Keble and Fineux, are well reconciled, vide Bract lib. 2. fol. 62 b. But in accompt it is a good plea before the auditors for the factor that he was robbed, as appears by the books in 12 (22) E. 3. Accompt 111. 41 E. 3. 3 and 9 E. 4. 40. For if a factor, (though he has wages and salary) does all that which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandise the best that he can, and a servant is bound to perform the command of his master: but a ferryman, common innkeeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and

shall not be discharged if they be stolen by thieves, vide 22 Ass. 41. Br. Action sur le Case 78. And the court held the replication idle and vain, for non refert by whom the defendant was robbed, vide 33 H. 6 (1) 31 a. b. If traitors break a prison, it shall not discharge the gaoler; otherwise of the King's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other not. Nota reader, it is good policy for him who takes any goods to keep, to take them in special manner, scil. to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance. So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance, which implies that he takes upon him to do it.[1]

MORSE v. SLUE, 1 Vent. 190, 238; 1 Mod. 85; 2 Lev. 69.[2]

(1671)

An action upon the case was brought by the plaintiff against the defendant; and he declared, that whereas, according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without loss or subtraction, ita quod pro defectu of them, they may not come to any damage; and whereas the 15 of

[1] The use of the word "safely" in the declaration would naturally lead us to infer that the court treated it as implying a warranty to keep safely at all events. Such is the construction placed upon the case in Jones on Bailments, 47. This view brings it into harmony with present conceptions; but by the judges who decided the case, the word "safely" seems to have been treated as stating merely a conclusion of law and as adding nothing to the obligation implied by law upon delivery. Coke understood the decision in this latter sense. The conclusion is irresistible that Southcote's Case is in entire harmony with the ancient view that a bailee is debtor for the thing bailed. Opinion may well differ about the propriety of the particular decision, for the time was now at hand when the old rule was to be discarded, but injustice has been done Lord Coke by later writers who have said that "to keep and to keep safely is all one" is a conceit of Lord Coke. 2 Street, Foundations. Leg. Lia. 263-265.

[2] Green, Cases on Carriers,. 313.

May last, the defendant was master of a certain ship called the William and John, then riding at the port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pair of silk stockings and 174 pounds of silk, by him to be transported for a reasonable reward of freight to be paid and he then and there did receive them, and ought to have transported them, etc., but he did so negligently keep them, that in default of sufficient care and custody of him and his servants, 17 May, the same were totally lost out of the said ship.

Upon not guilty pleaded, a special verdict was found, viz.:

That the ship lay in the river of Thames, in the port of London, in the parish of Stepney, in the county of Middlesex, prout, etc. That the goods were delivered by the plaintiff on board the ship, prout, etc., to be transported to Cadiz in Spain. That the goods being on board, there were a sufficient number of men for to look after and attend her, left in her. That in the night came eleven persons on pretence of pressing of seamen for the king's service, and by force seized on these men (which were four or five, found to be sufficient as before) and took the goods. That the master was to have wages from the owners, and the mariners from the master. That she was of the burthen of 150 tons, etc.

So the question was, upon a trial at bar, whether the master were chargeable upon this matter?

[Maynard insisted upon it: That the master was not chargeable: Say they, he is chargeable whilst he is here, but when he is gone out of the realm he is not chargeable, though the goods be taken from him. Which distinction, he said, had no foundation in law. HALE, C. J. It will lie upon you that are for the defendants, to show a difference betwixt a carrier and the master of a ship. And it will lie upon you that are for the plaintiff, to show why a master of a ship should be charged for a robbery committed within the realm, and not for a piracy committed at sea. It was urged by Mr. Holt for the plaintiff: That a hoyman and ferryman are bound to answer, and why not the master of a ship? The defendant proved: That there was no carelessness nor negligent default in him. Maynard. He is not chargeable, if there be no negligence in him, because he is but a servant, the owner takes the freight. HALE, C. J. He is exercitor navis. If we should let loose the master, the merchant would not be secure. And if we should be too quick upon him, it might dis-

courage all masters; so that the consequence of this case is great.]

The case was argued two several terms at the bar, by Mr. Holt for the plaintiff, and Sir Francis Winnington for the defendant, and Mr. Molloy for the plaintiff, and Mr. Wallop for the defendant; and by the opinion of the whole court, judgment was given this term for the plaintiff.

HALE, C. J. delivered the reasons as followeth.

First, by the admiral civil law the master is not chargeable pro damno fatali, as in case of pirates, storm, etc., but where there is any negligence in him he is.

Secondly. This case is not to be measured by the rules of the admiral law, because the ship was infra corpus comitatus.

Then the first reason wherefore the master is liable is, because he takes a reward; and the usage is, that half wages is paid him before he goes out of the country.

Secondly. If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens. There was a case (not long since) when one brought a box to a carrier, in which there was a great sum of money, and the carrier demanded of the owner what was in it; who answered, that it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed. And resolved that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there were money in it, he durst not take charge of it; and the owner had answered as before, this matter would have excused the carrier.

Thirdly. He which would take off the master in this case from the action must assign a difference between it and the case of a hoyman, common carrier or innholder..

'T is objected, that the master is but a servant to the owners.

Answer. The law takes notice of him as more than a servant. 'T is known, that he may impawn the ship if occasion be, and sell bona peritura; he is rather an officer than a servant. In an escape the jailer may be charged, though the sheriff is also liable, for respondeat superior. But the turnkey cannot be sued, for he is but a mere servant; by the civil law the master or owner is chargeable at the election of the merchant.

'T is further objected, that he receives wages from the owners.

Answer. In effect the merchant pays him, for he pays the owners freight, so that 't is but handed over by them to the master; if the freight be lost, the wages are lost too, for the rule is, freight is the mother of wages; therefore, though the declaration is, that the master received wages of the merchant, and the verdict is, that the owners pay it, 't is no material variance.

Objection. 'T is found, that there were the usual number of men to guard the ship.

Answer. True, for the ship, but not with reference to the goods, for the number ought to be more or less as the port is dangerous, and the goods of value, 33 H. VI, 1. If rebels break a jail, so that the prisoners escape, the jailer is liable; but is otherwise of enemies; so the master is not chargeable where the ship is spoiled by pirates. And if a carrier be robbed by an hundred men, he is never the more excused.

COGGS v. BERNARD, (2 Lord Raym. 909)

(1703)

In an action upon the case the plaintiff declared, quod cum Bernard the defendant, the tenth of November, 13 Will. III., at, &c., assumpsisset, salvo et secure elevare, Anglice to take up, several hogsheads of brandy then in a certain cellar in D, et salvo et secure deponere, Anglice to lay them down again, in a certain other cellar in Water Lane, the said defendant and his servants and agents tam negligenter et improvide put them down again into the said other cellar, quod, per defectum curae ipsius the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz., so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains, and the case being thought to be a case of great consequence, it was this day argued seriatim by the whole court.

GOULD, J. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common car-

rier, or whatever he is, if through his neglect they are lost or come to any damage; and if a praemium be laid to be given, then it is without question so. The reason of the action is, the particular truth reposed in the defendant, to which he has concurred by his assumption, and in executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is nudum pactum. So is the 3 H. VI. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129, upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud. ubi supra. Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160, 2 H. VII. 11, 22 Ass. 41; 1 R. 10, Bro. action sur le case, 78. Southcote's case (4 Co. Rep. 83 b.) is a hard case indeed, to oblige all men that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of: and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two Judges only, viz.: Gawdy and Clench. But in 1 Ventr. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for £30, the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

POWYS agreed upon the neglect.

POWELL. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question

is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shown? And I hold, an action will lie, as this case is. And in order to make it out I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider Southcote's case.

1. Those authorities in the Register, 110, a. b., of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs, which are framed short. But a writ upon the case must mention everything that is material in the case, and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, e., where there is a declaration so general. The Year Books are full in this point. 43 Ed. III. 33, a., there is no particular act shown. There indeed the weight is laid more upon the neglect, than the contract. But in 48 Ed. III. 6, and 19 H. VI. 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 H. VII. 11; 7 H. IV. 14; these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the gist of these actions is the undertaking. The party's special assumpsit and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest; &c. So it is 1 Jones, 179, Palm. 548. For the bailee is not bound upon any undertaking, against the act of God. Justice Jones in that case puts the case of 22 Ass. where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, viz., the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the

wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody he shall be answerable for them, for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. IV. 40, b., there is such an opinion by Danby. The case in 3 H. VII. 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. VII. 12, there is such an opinion by the by. And this is all the foundation of Southcote's case. But there are cases there

cited, which are stronger against it, as 10 H. VII. 26, 29 Ass. 28, the case of a pawn. My Lord Coke would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Ed. II., Fitzh. detinue, 59, the case of goods bailed to a man, locked up in a chest and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

HOLT, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them safely, and he managed them so negligently that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a de-

positum, and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it, for he will have it that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment., and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficient-

ly armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show, that there never was any such resolution given before Southcote's case. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is that the bailee is not chargeable if the goods are stole. As for 8 Edw., II Fitzh. detinue, 59, where the goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. VI. 4, b., was but a debate at bar. For Danby was but a counsel then; though he had been chief justice in the beginning of Ed. IV. yet he was removed, and restored again upon the restitution of Hen. VI., as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. VII. 4, is but a sudden opinion and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreason-

able, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. A fortiori he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, b. F. S.: "Apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpae autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare." As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited, is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, "Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet." So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214 acc., 2 Cro. 425 acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so, when spoken. Doct. & Stud. 130, is in point, that, though a bailee do promise to redeliver goods

safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's case; if the bailee be guilty of gross negligence he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz., commodatum or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, ubi supra. His words are: "Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumta fuerit, vel deperdita, subtracta, vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel praedonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur." I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must

use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, scilicet locatio or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b. "Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia; qualem deligentissimus paterfamilias suis rebus adhibet, quam si praestitiret et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est." From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., vadium or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, etc., but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat. As to the second point, Bracton, 99, b., gives you the answer: "Creditor, qui pignus accepit, re obligatur, et ad

illam restituendam tenetur; et cum hujus modi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactum adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere." In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be idemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote's case is. But indeed the reason given in Southcote's case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment; or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged, 26 Car. 2, in the case of Morse v. Slue, Raym. 220, 1 Vent. 199, 238; ante, p. 244. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is

chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, etc., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, etc. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called mandatum. It is an obligation, which arises ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius in his commentaries upon Justinian, lib. 3, tit. 27, 684, defines manda-

tum to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton, ubi supra, says, "Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis." I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are first, because in the case a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action, 1 Roll. Abr. 10, 2, Hen. VII. 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his own default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and that, after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. VI. 49 and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. IV. 33, this difference is clearly put, and

that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4 was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21, Jac. I. In the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideraiton. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of Morse v. Slue was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.[1]

[1] "This division (detinue and debt) had important effects upon the law of contract, for it is evident that all bailments would be relegated to the action of detinue. Now this action played no part in the development of the theory of contract, and bailments consequently remained outside that theory until the rise of the action of assumpsit restored them to their rightful position as a class of contracts. * * *

"Had the idea of consideration proved more stable, and made successful resistance to the process by which it has been reduced to its modern limits, its introduction into assumpsit would have caused a profound modification of the law of contract. As it is, however, it may be said that even had this equitable principle never been borrowed by the common law, the law of contract would have been, except in one point, practically identical with what it now is. The exception lies in this, that whereas the original limitation of assumpsit consisted simply in detriment to the promisee, consideration consists in such detriment regarded as an inducement to the promise. The difference is important, for its effect was to render assumpsit inapplicable, save by reasoning approaching closely to the fictitious, to the very cases to which trespass on the case was first applied. Coggs v. Bernard is a typical example of this. Damage directly resulting from the breach of contract, as the loss of the brandy in this celebrated case, cannot of course be regarded as an inducement to the promise; and therefore, although it would have fallen within the common law limitation of assumpsit, it is no consideration." Salmond: History of Contract, 3 Select Anglo-American Essays, 321, 333-4.

"In the earliest English law, there is some question whether the liability of bailees, including common carriers, and others pursuing common callings, was that of insurance, or simply that of responsibility for negligence. Justice Holmes (The Common Law, 164-205) maintains that the liability of all bailees was that of insurance, and that the present so-called common law liability of common carriers and innkeepers is a fragmentary survival of the earlier law in regard to all bailees. Professor Beale (Harv. L. Rev. 158-168) defends the theory that at first bailees in general were liable only for negligence, (though carriers and others engaged in a common employment were held to guard against some particular kind of loss), and that the special liability of common carriers as insurers was established not even by the case of Coggs v. Bernard, (2 Ld. Raym. 908) but by the case of Forward v. Pittard. (1 T. R. 27). A middle theory holds that, according to the early law of England, all bailees pursuing a common calling were liable in detinue for some particular loss as insurers, but only common carriers were absolute insurers, and then not until the time of Lord Holt and Lord Mansfield; that all bailees were liable in detinue (and therefore quasi insurers) when they had a cause of action over against the wrongdoer; that after the origin of the writ of trespass on the case bailees were also liable where they had undertaken to do something (assumpsit) and were guilty of misfeasance; and that later, through the confusion of the growing principles of contract with the old theories of tort, they were liable for a mere omission as well." 20 Harv. L. Rev. 927.

The unquestioned right of the bailor to sue in detinue and at first the necessity of suing in detinue, were sufficient to fix an absolute liability upon bailees. Detinue would lie only where there was an obligation in the nature of debt. Bailees were regarded as owing to the bailor the chattels which the latter had placed in the possession of the former. Hence the difficulty of bailees escaping liability for loss, even when the chattels were destroyed or stolen through no fault of their own. If the bailor happened to sue in some other form of action it was easier to relax the principle of absolute liability. This relaxation began with the action of account, was continued through case and trespass on the case, and was consummated in assumpsit.

AMES: HISTORY OF ASSUMPSIT, 2 Harv. L. Rev. 4-7.

The normal remedy against a bailee was detinue. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in detinue might be defeated by the defendant's wager of law; if he had paid in advance for the safe custody of his property, he could not recover in detinue his money, but only the value of the property; detinue could not be brought in the King's Bench by original writ; and the procedure generally was less satisfactory than that in case. It is not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in as early as 1449. The plaintiff counted that he delivered to the defendant nine sacks of wool to keep; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection; and Statham adds this note. * * * "et credo the reason of the action lying is because the defendant had six shillings which he (plaintiff) could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472, and was expressly stated a few years later. (1510.)

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his assumpsit to keep them safely, and their subsequent loss by his default, together make up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII, Moore, Sergeant, said, without contradition, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or

case; and it is common learning that a gratuitous bailee was charged for negligence in the celebrated case of Coggs v. Bernard. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special assumpsit was an established form of action. But, in fact, there are few instances of such declarations before the reign of Charles I. Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of declaring against a bailee. Oddly enough, the earliest attempts to charge bailees in assumpsit were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration. The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in assumpsit on a gratuitous bailment.

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity of alleging an express assumpsit of the defendant. Bailees whose calling was of a quasi public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an assumpsit was never laid in a count against a common carrier or innkeeper for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express assumpsit was originally indispensable. An assumpsit was accordingly laid as a matter of course in the early cases and precedents. But with the lapse of time an express undertaking of the bailee ceased to be required. * * * The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

WILLIS: ASSUMPSIT, 3 Standard Ency. of Pro., 170-175, 192.

Assumpsit is the most modern of all the contract actions and has practically supplanted all the others. Like all the contract

actions it is a form of action for the redress of the violations of those acquired legal rights which exist because of special relations into which parties have entered. It will not afford redress for the violations of those legal rights which every person possesses because he is a member of a civilized society, and which are called natural legal rights. * * *

The crude category of remedies devised in the comparatively barbarous periods of English law afforded no remedy for, or recognition of, a case, where, although no wrongful act is done, there exists what is now regarded as a culpable injurious omission. Nor did they recognize as injurious in the cognizance of the law (i. e. actionable), consequential harm or damage resulting collaterally where the element of direct force (trespass) was not present; or where the idea of force was inapplicable because the subject-matter was not corporeal, even though the act was followed by immediate but consequential harm. As civilization progressed society began to recognize the reality of consequential injury from negligent action or non-action, and the necessity for some remedy for such wrongs. The judges, however, had no power to extend their jurisdiction beyond what they considered the legitimate scope of the original writs framed to meet the cases in which the law afforded remedies.

Among the old actions upon contract were the actions of covenant upon what were, of course, always express contracts under seal, and the action of debt, which was in the old time, with detinue, the only remedy on executory contracts not under seal. These were wholly inapplicable to a vast number of cases of actual contracts and to transactions where clearly the parties meant to have their actions followed by payment or restoration. Moreover, these actions were clogged by the defect that under the old system the defendant by waging his law practically defeated the application of a truly judicial remedy.

It was under these circumstances that the celebrated statute, 13 Edw. I, c. 24, commonly known as the Statute of Westminster the second, was passed, under which, by the combined action and "consent of men learned in the law," the clerks of chancery and the courts, the elastic and beneficent action on the case and the modern offshoot of the same, namely, the action of assumpsit, were invented. * * *

In cases of simple contract, where the defendant had undertaken to do something for the plaintiff and by some wrongful affirmative act, i. e., malfeasance, had failed or defeated the purpose of the contract (as, for example, where the defendant had undertaken to carry the plaintiff's horse across the river but had overloaded his boat with other horses, causing the plaintiff's horse to perish), an action was allowed on the theory of tort.

Another form of injury under circumstances of contract was misfeasance, i. e., doing improperly what one was bound to do. In this manner the action of trespass on the case in form ex delicto was extended into the domain of simple executory contracts, and in this aspect it extends only to contracts which in some part must be express.

The extension of the remedy so as to allow an action for the mere non-performance of promises was not so easily worked out in theory, and naturally lagged in point of time. The first case of this kind is in 2 Henry IV. It was an action against a carpenter, who was alleged to have agreed to build a house within a given time, which he had not done (mere failure to act). This and several like cases subsequently brought were dismissed, on the ground that such an action was not sustainable, thus leaving without remedy simple contracts not under seal. Afterwards, in the reign of Henry VII., it was held that an action on the case would lie as well for nonfeasance as for malfeasance, and this, as Spence says, is the origin of the modern action of assumpsit. For some time the formula of statement retained the tort feature, but ultimately this was dropped, and the action took on the form of mere conract, and is now classed as an ex contractu action.

The distinction between actions on implied contracts, properly so-called, and actions quasi ex contractu is not without practical value. There are many acts and transactions between men where the natural, i. e., logical, inference from the acts of the parties is that one party intends to compensate the other, although no agreement to that effect is made; also many cases of voluntary enrichment of one at the expense of another, under circumstances clearly implying, by the logical process of reasoning, the intention to compensate. There are also many other situations where the parties receiving, although shown by the most clear and uncon-

trovertible evidence not to intend to make payment, are held in the law obliged to pay. * * *

Special assumpsit is an action on the case in the nature of deceit for the recovery of damages for the breach of those legal obligations which are created by express agreement. The root of liability in special assumpsit, as in deceit, is detriment, or damage. At first special assumpsit was regarded as a tort action, but it is now classed as a contract action. The action grew up out of the authority given by Parliament in 1285 to the clerks in chancery to issue writs in consimili casu with the existing writ, when no writ was found for a case similar in its facts to one for which a writ already existed. When the action became known as a contract action the detriment to the promisee became the consideration for the contract, which was then unilateral. Later special assumpsit was extended to the bilateral contract, when the promise to sustain a detriment became the consideration.

General assumpsit, so called because there are general forms devised for stating the various causes of action, is an action on the case in the nature of debt for the recovery of damages for the breach of the promise implied in law in quasi-contracts, for the breach of inferred contracts, and for the breach of express contracts performed except for the payment of money. The explanation of general assumpsit is found in the older action of debt, which lay for any pecuniary demand which could be reduced to certainty, whether created by contract, custom, or record. The consideration in general assumpsit, as in debt, is quid pro quo, or benefit to the promisor (defendant). General assumpsit is bounded by the limits of debt, except as it was extended to other quasi contracts (because of their analogy to debts), and to inferred contracts by the quantum and common counts. It owed its origin to the desire of the court of Queen's Bench for more extensive jurisdiction, and to its freedom from various technicalities that hampered the action of debt.

STREET: ACCOUNT, FOUNDATIONS OF LEGAL LIABILITY, Vol. III., pp. 99-102, 107.

The action of account, it may be noted, could be used by the bailor in enforcing the liability of the bailee, if the bailor pre-

ferred to pursue such remedy rather than to sue in detinue. In this connection a noteworthy distinction existed between the degree of liability enforced in applying the respective remedies. The bailee when sued in detinue was treated as a debtor, and was originally held absolutely liable for the chattels bailed or their value. Hence loss by robbery was no defence in his behalf. Now the action of account, unlike detinue, is in the nature of an equitable remedy, both as regards the conception which underlies it and the procedure by which it is enforced. Accordingly it has always been accepted as law that the accountant will be discharged before the auditors where he shows that the money or goods committed to him were lost by robbery and without negligence on his part.

The common law action of account is founded directly on the legal duty to render an account, and this duty does not arise out of contract in the modern sense. It belongs to the stratum of real contract law rather than to the field of assumpsit. * * * There are but three classes of common law accountants—guardians, bailiffs, and receivers; and the duty of accounting is imposed upon these persons by virtue of the fact that under certain conditions they have the legal possession of property belonging to another. * * * In the strict theory of the early law the bailiff is distinguishable from the bailee by the circumstance that the bailiff receives the property either for the purpose of selling it or for the purpose of using it in order to produce an income for the owner. * * * The bailee, on the other hand, does not handle or manage for the profit of the owner of the goods committed to his keeping. He holds solely for the purpose of keeping, conveying, managing, or performing work upon the thing bailed, with the ultimate object of restoring it to the owner when the purpose of the bailment is accomplished, or of delivering it to his order.

There was an active controversy in the early part of the nineteenth century between Judge Story and Chancellor Kent as to whether the term bailment is properly to be applied to cases in which no redelivery to the owner or his agent is contemplated. Judge Story gave the term bailment sufficient latitude to include a consignment of goods to a factor to be sold. * * * Chancellor Kent (disagreed) * * * Strictly speaking the factor is one of the common law accountants, and Judge Kent evidently

had the ancient distinction between bailiffs and bailees in mind. When the question was mooted, however, the law of account had long since ceased to be familiar and the term bailiff in its broad sense had dropped out of use. It was therefore necessary to extend the term bailee so as to cover this case. The legal liability is substantially the same. * * * Judge Story's view has, therefore prevailed."

CLASSIFICATION OF BAILMENTS, CARRIERS AND PUBLIC CALLINGS.

BAILMENTS.

1. Gratuitous.
   a. Gratuitous services.
      (1) Deposits.
      (2) Mandates.
   b. Gratuitous loans.
      (1) Commodates.
      (2) Mutuums. (Not common law bailment.)
2. Mutual benefit.
   a. Pledges.
   b. Hirings.
      (1) Hired use of a thing.
      (2) Hired work upon a thing.
      (3) Hired custody of a thing.
         (a) By private party.
         (b) By public calling.
            1. Bailments.
               a. Public warehousemen.
               b. Innkeepers.
      (4) Hired carriage of a thing.
         [(a) By private carrier.]
         (b) By public calling.
            1. Bailments.
               a. Common carriers of goods.
                  (1) Railways.
                  (2) Express companies.
                  (3) Ferry companies.
                  (4) Dispatch companies.
                  (5) Shipmasters.
                  (6) Draymen.
                  (7) Canal boats.

PUBLIC CALLINGS.

            2. Not bailments.
               a. Common carriers of passengers.
                  (1) Passenger railways.
                  (2) Street railways.
                  (3) Elevated railways.
                  (4) Passenger elevators.
                  (5) Stage coaches.
                  (6) Omnibus lines.
                  (7) Ships.
                  (8) Ferries.
                  (9) Hacks.
                  (10) Taxicabs.
               b. Not common carriers.
                  (1) Telegraph lines.
                  (2) Telephone lines.
                  (3) Sleeping cars.
                  (4) Water works.
                  (5) Gas works.
                  (6) Electric plants.

CHAPTER II.

DEPOSITS

1. Creation.

ARMORY v. DELAMIRIE, 1 Str. 505.

(1722)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth: and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be one of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.[1]

[1] "He which findes goods, is bound to answer him for them who hath the property; and if he deliver them over to anyone, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely." Per Coke C. J., in Isaack v. Clark, 2 Bulst, 306, 312 (1615).

DURNFORD v. SEGHERS SYNDICS, 9 Martin. (La.) 470.

(1821)

Appeal from the court of the first district.

PORTER, J. The plaintiff claims the right of being placed among the privileged creditors of the insolvent, and paid in preference to those merely personal—on the ground that the debt due him, arose from a deposit.

The facts, proved in the case, show that Seghers had been employed as attorney by the plaintiff, to attend to several suits, and collect debts, and that he received a compensation for so doing. In the month of July, 1812, there was a settlement of their accounts, and a check was received by the plaintiff, for the balance due, $5,900.07, which it would appear from the evidence, he retained in his hands several years, without presenting it for payment. It is the amount of this check, that is now contended, should be paid as a privileged claim.

This is clearly not a regular deposit, where the depository is obliged to return the identical thing confided to his care. The plaintiff admits that it is not; but insists it is that species of contract known to our law called an irregular deposit, which is made of money, or other things that consist in number, weight and measure, and which are delivered without any restriction on the depository's using them, but merely with the obligation to return the same quantity of the article received.

There is no doubt from the authorities cited in argument, that this definition of an irregular deposit is correct, and that it gives the preference claimed. The only question here is, whether the contract now before the court comes within the definition given?

It is believed that it is of the essence of this contract, whether the deposit be irregular or regular, that it should be entered into without compensation on the part of him who receives the object in his care. Pothier Traité du contrat de Depot, chap. 1, art. 2, sec. 3, no. 13. Febrero, part. 1, chap. 4, sec. 3, in the language of our Code, it is essentially gratuitous. Civil Code, 410, art. 4.

It is equally necessary that the will of both parties should concur in the contract, that there should be a delivery of the thing to be deposited, and that the principal object of this delivery, should be the taking care of the thing. Pothier, ibid. chap. 1, art. 2, Civil Code, 410, art. 1 and 2, 412, art. 8.

Applying this law to the case before the court, we find that the debt of $5,900, was the balance of moneys coming into the hands of Seghers, as a lawyer collecting various demands of the plaintiff. The account presented by the plaintiff and annexed to the petition, shows that $1,500 were paid for fees, and other expenses, incident to these services. There is nothing gratuitious in this.

But the plaintiff insists that these payments were made to the insolvent for his services, as a lawyer, prosecuting the claims put into his hands to judgment—that receiving and paying over the money, made no part of his duty, and that, what he did in that respect was entirely gratuitous.

The evidence does not prove this. It shows that the services of the attorney did not end with the judgment; on the contrary, that he acted as the agent of the plaintiff afterwards. The account, already referred to, establishes the fact, that he settled and arranged those judgments by receiving part in cash, and part in other securities, which he paid over. How can it be said, that these services were not included in the sum charged and allowed in the settlement, or that the compensation related alone to obtaining judgment?

But admitting that the evidence did support the plaintiff in the petition, where is the consent of Durnford, that Seghers should be his depository? I cannot discover from the evidence, that he intended the attorney should do any thing more than collect his money, and pay it over, or that he ever contemplated it was to be left in his hands. Pothier, in his treatise already cited, no. 9; states, that to make a contract of deposit, it must appear, "que la principale fin de la tradition soit uniquement que celui a qui la tradition est faite se charge de la garde de cette chose." He puts many cases to illustrate this doctrine, and among others, that taken from the Digest, 16, 3, 1, no. 13; that if one party charges another to receive, and take care of an object, which was in the hands of a third person, that this does not make a contract of deposit; because the principal object of the contract, was not that the thing should be kept, but that it should be taken out of the hands of him who had it in possession. It is not easy to perceive the distinction between that case and the one now before the court, unless it be in circumstances still more adverse to the claim here set up—namely—that the attorney took the money, (as the plaintiff insists) without any particular authority to that

effect; and that he received, (as I understand the evidence) a compensation for so doing.

I see nothing in the transaction which distinguishes it from the ordinary case of an agent collecting money on commission, and it is to my mind, a totally different contract from that of one man depositing in the hands of another, an object to be gratuitously kept for his benefit.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed as a simple creditor, on the tableau of distribution of the insolvent estate; that the appellee pay the cost of this appeal, and that the costs in the district court be borne by the appellants.

BUNNELL v. STERN ET AL., 122 N. Y. 539, 25 N. E. 910. (1890)

The complaint as indorsed upon the summons is as follows, viz.: "Damages by reason of negligence of defendants," but, as elsewhere stated in the appeal book, it was in these words: "Loss of a cloak and other articles left in the care of defendants while the plaintiff was being fitted to a wrap." The answer was a general denial.

The justice, before whom the cause was tried without a jury, rendered a judgment in favor of the plaintiff for $50 and costs. Upon appeal to the General Term, this judgment was at first affirmed, but after a reargument, it was reversed and leave given to appeal to this court.

VANN, J. The defendants are the proprietors of a retail store on Twenty-third street in the city of New York, which has a department for the sale of ready-made cloaks. On the 19th of April, 1887, the plaintiff went to their store to purchase a wrap, and, entering the cloak department and making known her business, was conducted by one of the saleswomen to a place where there were two chairs near a mirror. She sat down on one of the chairs while the clerk brought her several garments to examine, and, after looking them over for ten or fifteen minutes, she selected one to try on and went to the mirror for that purpose. A large window was open near by, and she complained of the draught, whereupon the clerk conducted her through a passage-

way formed by iron frames, on which wraps were hung, to another compartment about twenty-five feet distant, where there was a mirror but no chairs. The clerk carried the new cloak, and stood in front of the mirror waiting for the plaintiff to put it on. The plaintiff carried her own cloak, which she had removed in order to try on the other, to the place where the clerk stood, and laid it on a counter about eight feet from the mirror, directly in front of another clerk who stood behind waiting upon a customer. She did not ask, and was not told, where to put her cloak, but the saleswoman who was waiting upon her, as well as the clerk behind the counter, observed her as she thus laid it down, but neither said anything. There was no other place to put the cloak. The plaintiff, after spending four or five minutes in trying on the garment, said that she would take it, and at once went to get her cloak, but it could not be found, although a careful search was made for it. Only one other customer was in either of the compartments while the plaintiff was in the store.

There was a floor-walker in the cloak department who had the same authority there as one of the defendants.

The clerk who waited upon the plaintiff testified that customers, under such circumstances, placed their cloaks on chairs and where it was most convenient for them, and that she paid no attention to garments removed in order to try on others.

No notice was given to the plaintiff either directly or indirectly as to where she should put her cloak and no instructions had been given by the defendants to their clerks as to the disposition of garments removed by customers in order to try on those offered for sale. These facts were either expressly sworn to and not denied, or are permissible inferences which the trial justice, sitting without a jury, is presumed to have drawn from the evidence. The question is thus presented whether the defendants owed any duty to the plaintiff, which they omitted to discharge to her injury.

The defendants kept a store and thus invited the public to come there and trade. In one of its departments they kept ready-made cloaks for sale and provided mirrors for the use of customers in trying them on, and clerks to aid in the process. They thus invited each lady who came there to buy a cloak to remove the one she had on and try on the one that they wished her to purchase, because the invitation to do a given act extends by

implication to whatever is known to be necessary in order to do that act. It is not perceived that under the circumstances disclosed by the evidence, the obligation of the defendant would have been greater or in any respect different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had also requested her to take off her wrap and try on the one that he offered to sell her. The clerk who waited upon her stood in the place of the defendants as long as she was engaged in the line of her duties and no claim is made that she at any time exceeded her authority. Therefore, when she led the way to the second mirror and stood before it holding the new garment in her hands in readiness to help the plaintiff try it on, in legal effect one of the defendants stood there inviting her to try it on, and to lay aside her wrap for that purpose. She accepted the invitation and removed her wrap, but as she could not hold it in her hands while she tried on the other, it was necessary for her to lay it down somewhere. No place was provided for that purpose. There was not even a chair in sight. She was neither notified where to put it, nor informed that she must look out for as it would be at her own risk whatever she did with it. She put it in the only place that was available, unless she threw it on the floor, and as she did so, in contemplation of law, the defendants stood looking at her. Under these circumstances we think that it became their duty to exercise some care for the plaintiff's cloak, because she had laid it aside on their invitation and with their knowledge and, without question or notice from them, had put it in the only place that she could. The consideration for the implied contract imposing that duty resided in the situation of the plaintiff and her property for which the defendants were responsible, and in the chance of selling the garment that she had selected. It is unnecessary for us to define the degree of care required by the circumstances, because no care whatever was exercised by the defendants. While they created the situation that required care, they made no provision for it by furnishing a safe place to deposit the property of customers, or notifying the plaintiff to look out for her cloak herself, or making rules for the government of their employes under such circumstances, or in any other way. Even the chairs on which customers were in the habit of leaving their garments

were wholly wanting, and the floor-walker was absent without explanation as to the reason. As the defendants were bound to use ordinary care to keep their premises in a safe condition for the access of business visitors, whether expressly or impliedly invited (Coughtry v. Globe Woolen Co., 56 N. Y. 124, 126; Beck v. Carter, 68 id. 283; Welch v. McAllister, 15 Mo. App. 492; Nave v. Flack, 90 Ind. 205; Pastene v. Adams, 49 Cal. 87; Learoyd v. Godfrey, 138 Mass. 315), so we think they were bound to use some care for the property of the plaintiff, properly brought there and necessarily laid aside by their implied invitation in order to attend to the business in hand. They omitted to do that which "a reasonable man, guided by those considerations that ordinarily regulate the conduct of human affairs" would have done under the same circumstances, and were thus guilty of negligence.

Our attention has been called to no authority directly in point. The cases relied upon by defendants are Carpenter v. Taylor, (1 Hilt 193); Rea v. Simmons (141) Mass. 561); Whitney v. Pullman Palace Car Co. (9 N. E. Rep. 619).

In Carpenter v. Taylor, the plaintiff entered the saloon of a hotel to get refreshments between twelve and one o'clock at night and when he went out the place was being closed. He left his opera-glass behind, but it did not appear where, and the next morning when he called for it, it could not be found. As it did not appear that the defendant or any of his servants ever received, or even saw the glass, it was properly held that he was not responsible for its loss.

While Rea v. Simmons is somewhat analagous to the case at bar in its facts, the decision seems to have proceeded on a question of practice. The entire opinion consists of ten lines and states that while the case was reported to the court for its opinion upon the question of law involved, no specific questions of law are stated in the report and none appear to have been raised at the trial. It then states that the decision of the trial court upon the facts is conclusive and cites two authorities which hold that the facts found below are not open to review.

In Whitney v. Pullman Palace Car Company, the decision was simply that the plaintiff was guilty of contributory negligence, while the question whether there was any evidence of negligence on the part of the defendant was expressly reserved.

We think that the defendants as voluntary custodians for profit to themselves, were bound to exercise some care over the plaintiff's cloak, and, that on account of their absolute failure in this regard they were properly held liable by the trial court for the damages that she sustained.

The order of the General Term should be reversed and the judgment of the District Court affirmed with costs.

All concur, except Bradley, J., dissenting.

Order reversed and judgment affirmed.[1]

BEALE: GRATUITOUS UNDERTAKINGS, 5 Harv. L. Rev. 222.

A contract is a right which A has (in personam) against B, because B has consented, for a consideration, or in some formal manner, to assume the correlative duty. A tort is a violation of a right which A has (in rem) against B, equally with all others, because society has decreed that the corresponding duty should be laid upon every member of it. Between these classes of rights exists a third; which, unlike a tort, depends upon some voluntary act by B, by which he undertakes a duty, and, unlike a contract, does not depend upon any promise by B, but only upon the mutual relations of A and B. In other words, B assumes a duty merely by voluntarily entering into a new relation towards A.

To create such a right and duty no consideration need be shown, since no contract is necessary. As a matter of fact, entrance into such a relationship is often the occasion of a contract, which may to some extent supersede the principles of the common law, and govern the rights and duties of the parties. Thus, in case of carriage, some of the rights of the parties are often secured by a contract,—the bill of lading. But even in these cases the terms of the contract seldom embrace the whole transaction. In order to avoid complications, however, I shall consider cases where the relationship is gratuitous, so that the principles of law cannot be modified by contract; but the same principles govern all relationships, except so far as they are

[1] Liability of shopkeeper for property of customers, 20 Harv. L. Rev. 491. 10 L. R. A. 481.

superseded by the express provisions of some contract. There is no technical name for these rights.[1] In the old law, action for the breach of such a right was induced by an assumpsit, or, as it should be translated in such a case, he undertook. Following this old use, which is by no means uncommon to-day, I shall call a right of this sort an undertaking.[1] * * *

An undertaking is the entrance of two parties into such relationship as that one party, on account of the bare relationship unaided by any agreement, has a new duty to perform toward the other; he undertakes a new duty. The definition may be rendered clearer by some examples of gratuitous undertaking. A's sheep falls into a river; B, seeing it, undertakes to rescue it. Before the undertaking, B has no duty toward A in the matter; but as soon as he actually enters upon the task of rescue, he must perform it with proper diligence. Any negligence by which the sheep is injured would render him liable to A; so would a negligent abandonment of the rescue when it was almost certain to succeed. A falls senseless in the street; B, a passing physician, undertakes to cure him. B might have passed by and left A to his fate; but having undertaken the work, he is liable for any negligence, either of commission or of omission. * * *

All these are cases where the relationship between the parties was voluntary; in none of them is there any contract, and in most of them the liability of B could not arise from any tort, properly so called. One of the most important classes of undertakings, however, is bailments; and for a long time it was held that every bailment included a contract. There has lately been a determined effort to controvert that doctrine, which is certainly untenable with regard to gratuitous bailments, because there is no consideration to support a contract. It is urged that the giving up of the goods by the bailor is sufficient. But so far from being a detriment, this is usually a benefit to the bailor; it secures protection to the goods for the bailor, but gives the bailee no right to use for any purpose. Even the element of mutual assent is not necessary. B, for instance, finds A's pocket-book in the street, and takes it up for the benefit of the owner; it is

[1] The modern tendency of the law is toward giving the name of quasi-contracts to the legal rights, between contracts and torts, which Professor Beale classifies as undertakings. Ed.

absurd to say that B promises the unknown owner, in consideration of being allowed to pick it up, to find him out and return it in good condition, and that such a promise is agreed to by A. Yet that is the absurdity to which we are brought by the ordinary doctrine of bailment. It is clear that there is really no contract in the case, at least, of grauitous bailments, but that the rights and liabilities of the parties are regulated merely by the bailee's undertaking to hold the property.

It is equally true that the violation of an undertaking is not a tort, properly so called. * * *

It seems, then, that in all such cases the liability of the party at fault is to be decided by certain principles of the common law, distinct from those governing liability in cases of tort or breach of contract, which should be grouped together into another division of personal rights, coordinate with torts and contracts. * * * When those actions in which the assumpsit was merely an inducement were differentiated from those in which it was the gist of the action, the former would properly have united with the old action of detinue founded on bailment, to make up the grand division of undertakings; just as the latter united with actions of debt and covenant to form the grand division of contracts. Bailments, however, were after a struggle drawn off into the division of contracts; and the few other cases of undertaking then known, not being of sufficient importance to form a separate division, either followed bailments, or with other actions on the case sank back into the division of torts. * * *

It is to be noticed at the outset that there are two classes of undertakers: Private undertakers, who assume a duty pro hac vice, and public or common undertakers, whose business it is to assume the duty. * * *

A new test, easier of application,—What did he undertake to do?—is substituted for the old one, What was the degree of the defendant's negligence. * * * The degree of care required of an undertaker is not proportionate to the reward, and therefore the fact that the duty was undertaken gratuitously is immaterial, except as evidence of the extent of care undertaken.[1]

[1] 17 Harv. L. Rev. 501.

2. Obligations of Bailee (Depositary)

FOSTER v. ESSEX BANK, 17 Mass. 479.

(1821)

Parker, C. J. This is general assumpsit, to recover of the defendants the value of certain gold ($50,000), deposited by the plaintiffs' testator in the bank of which the defendants are the proprietors; and the facts, upon which the action is founded, are established by a special verdict, found by the jury who tried the issue.

1st. Whether the bank made any contract with the plaintiffs' testator.

2d. What is the nature of that contract.

3d. Whether it has been violated.

1. On the first point we have had little difficulty. For, notwithstanding the act of incorporation gives no particular authority or power to receive special deposits; and although the verdict finds that there was no regulation or by-law relative to such deposits, or any account of them required to be kept and laid before the directors or the company, or any practice of examining them; yet as it is found that the bank, from the time of its incorporation, has received money and other valuable things in this way; and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited; the corporation must be considered the depositary, and not the cashier or other officer, through whose particular agency commodities may have been received into the bank.

No authorities are necessary to support this position. It rests upon common and familiar principles. The master and owner of a house or warehouse, allowing his servants or clerks to receive for custody the goods of another, and especially if the practice be general and unlimited, as is the case with banks in relation to special deposits, will be considered the bailee of the goods so received, and will incur the duties and liabilities belonging to that relation. Not so, if the servant, secretly and without the knowledge, express or implied, of the master, he not

having authorized or submitted to the practice, receives the goods for such purpose: for no man can be made the bailee of another's property, without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties. And this brings us to the consideration of the second point, viz.

2ly. The nature and legal qualities of this contract.—It will not be disputed, that, if it amounts only to a naked bailment, without reward and without any special undertaking, which in the civil and common law is called Depositum, the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith: as every one, who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of it. The degree of care, which is necessary to avoid the imputation of bad faith, is measured by the carefulness, which the depositary uses towards his own property of a similar kind. For although that may be so slight, as to amount even to carelessness in another; yet the depositor has no reason to expect a change of character, in favour of his particular interest: and it is his own folly to trust one, who is not able, or willing, to superintend with diligence his own concerns.

This principle, although denied by Lord Coke, as in 1 Inst. 89 b, has been received as the law regulating gratuitous bailment, as it is sometimes called, or mere deposit, where there is no advantage but to the depositor, from the luminous opinion of Lord Holt in the celebrated case of Coggs vs. Bernard, down to the profound and brilliant treatise of Sir William Jones, in which, with a wonderful mixture of learned research and classical illustration, he has analysed the complicated contract of bailment; and applied the principles of moral philosophy, the doctrines of the civil law, and the usages of all nations, ancient and modern, to the different branches of this diversified subject, so as to leave little room for speculation, except as to the application of his rules to particular cases, as they arise.

The dictum of Lord Coke, that the bare acceptance of goods to keep implies a promise to keep them safely, so that the depositary will be liable for loss by stealth or accident, is entirely exploded; and Sir W. Jones insists that such a harsh principle cannot be inferred from Southcote's case, (36) on which Lord

Coke relied: the judgment in that case, as the modern civilian thinks, being founded upon the particular state of the pleadings, from which it might be inferred, either that there was a special contract to keep safely, or gross negligence in the depositary. But as the judges Gawdy and Clench, who alone decided that cause, said that the plaintiff ought to recover, because it was not a special bailment, by which the defendant accepted to keep them as his own proper goods and not otherwise (37); the inference which Lord Coke drew from the decision, that a promise to keep implied a promise to keep safely, even at the peril of thieves, was by no means unwarranted. But the decision, as well as the dictum of Lord Coke in his commentary, were fully and explicitly overruled by all the judges, in the case of Coggs vs. Bernard, and upon the most sound principles. It is so considered in Hargrave and Butler's note to Co. Lit. n. 78, and all the cases since have adopted the principle, that a mere depositary, without any special undertaking and without reward, is answerable for the loss of the goods only in case of gross negligence; which, as is every where observed, bears so near a resemblance to fraud, as to be equivalent to it in its effect upon contracts.

Indeed the old doctrine, as stated in Southcote's case and by Lord Coke, has been so entirely reversed by the more modern decisions, that, instead of a presumption arising from a mere bailment, that the party undertook to keep safely, and was therefore chargeable, unless he proved a special agreement to keep only as he would his own; the bailor, if he would recover, must, in addition to the mere bailment alleged and proved, prove a special undertaking to keep the goods safely; and even then, according to Sir William Jones, the depositary is liable only in case of ordinary neglect, which is such as would not be suffered by men of common prudence and discretion: so that if goods deposited with one who engaged to keep them safely was stolen, without the fault of the bailee, he having taken all reasonable precautions to render them safe, the loss would fall upon the owner, and not the bailee. And Sir William Blackstone, in his commentary, recognizes the same principle; for he says, "if a friend delivers any thing to his friend to be kept for him, the receiver is bound to restore it on demand: and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise: unless he expressly

undertook to keep them only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is construed to be an evidence of fraud. But if he undertake specially to keep the goods safely and securely, he is bound to answer all perils and damages, that may befall them for want of the same care, with which a prudent man would keep his own." 2 Comm. 453. And this certainly is the more reasonable doctrine; for the common understanding of a promise to keep safely would be, that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust, if, notwithstanding such care, the goods should be spoiled or purloined. Any thing more than this would amount to an insurance of the goods; which cannot be presumed to be intended, unless there be an express agreement, and an adequate consideration therefor.

The doctrine, as thus settled by reason and authority, is applicable to the case of a simple deposit, in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith, in exposing the goods to hazards, to which he would not expose his own. This would be crassa negligentia, and for this alone is such a depositary liable.

If we proceed one step further in the gradation of liabilities, we shall discover every legal principle, which can by possibility affect this cause, considered as founded on a contract of bailment. It was urged by the plaintiff's counsel, that this is not a naked bailment, but is accompanied with an advantage from the use of the property, or the credit derived from the custody of it: and that this ought to be viewed in the light of a reward, so that the case will be brought within the principle of bailment for hire or reward. If it be so, the principle applicable to this species of bailment goes no further than to make the bailee liable in case of ordinary neglect; so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused. This is the doctrine of sir William Jones, and was the opinion of Lord Kenyon in the case of Finnucane v. Small, cited in the argument; which though a nisi prius decision, is satisfactory evi-

dence of the law, as two very eminent sergeants acquiesced in his opinion.

And this is also reasonable, for one who takes goods into his warehouse, to keep for a stipulated price, does not intend to insure them against fire or thieves. His compensation is only in the nature of rent; or if anything beyond that, only for the vigilance of a man of common prudence. If he locks and fastens the warehouse, as other prudent people do, and thieves break through and steal, he ought not to be accountable: if he leave the door or windows open, he ought to be. The common sense of mankind must acquiesce in these reasonable provisions of the law: and without doubt the common dealings of men are governed by them, as principles of natural justice, without a knowledge of the positive law.

Having thus settled satisfactorily to ourselves the principles, by which our judgment in this action is to be guided; we proceed to a consideration of the facts, in order to ascertain under what species of bailment the plaintiff's property was committed to the keeping of the defendants. It has been before observed that, as it was received into their building and placed in their vaults by their servants, according to a practice allowed of by them, they must be responsible in some degree: and are bound to restore it, or the value, unless it has been lost by some accident, for which they are not liable by the nature of their contract. We think there is no doubt that on such a deposit an action of trover would lie against the corporation, if they should refuse to deliver the property on demand; and assumpsit might also be maintained, it being settled, by the later authorities that either action may be maintained against an incorporated company, as well as against a natural person; although the doings, on which the action is founded, are not verified by the seal of the corporation. Vide the opinion of Mr. Justice Story in the case of The Bank of Columbia vs. Patterson's adm'r. 7 Cranch 299, in which all the learning upon the subject of corporate liabilities is exhausted.

Looking in to the special verdict, we find the money of the plaintiffs' testator, contained in a chest which was locked and the key kept by his agent, was received into the bank by W. S. Gray the cashier, in the presence of W. Orne, who was president of the bank at the time. The money, being gold, was weighed

in the presence of the president and cashier, and a memorandum of the different pieces in separate bags taken by the cashier and given to Mr. Bond, the testator's agent, with this writing signed by Mr. Gray as cashier, viz. "left at Essex bank for safe keeping." The verdict finds that the chest, containing the gold, was left at the bank as a special deposit: that the bank was not authorized to use the money, or treat it otherwise than a special deposit: that it was kept in the vault of the bank, until it was removed to Haverhill for better security in time of war, with the consent and at the expense of the owner: that after the danger was over, it was brought back and replaced in the vaults of the bank, with the specie belonging to the bank, and there remained until it was pilfered, as afterwards stated in the verdict. Mr. Bond, the agent of the owner, was in the practice of coming to the bank, to look into the vault to see that the money was safe; but it did not appear that he opened the cask or counted the money. Some of the doubloons were delivered to the agent, on the order of the testator, by the cashier in August, 1817; and at other times other doubloons were delivered in the same manner on similar orders. At each of these times the cask was opened by the cashier or chief clerk, to deliver the doubloons, pursuant to orders. This was done without the knowledge of any of the directors. They knew nothing of the delivery of the doubloons, nor was any account taken of them in the books of the bank. It is found that no return or statement of special deposits was ever made to the directors by the cashier; and that such deposits are made and taken away without the particular knowledge of the directors, although they know it is the practice so to receive and take them. The directors knew nothing of the nature or amount of this or any other special deposit, unless such knowledge may be presumed from the agency of the president and cashier in receiving this deposit, or of the cashier when he delivered the doubloons pursuant to orders. And it is found not to be the practice of this or any other bank, for the directors to inspect or examine special deposits; and it is considered improper for any officer to do so, without the consent of the depositor.

Upon this state of facts, we think it most manifest that, as far as the bank was concerned, this was a mere naked bailment, for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the

effect of such a contract. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents. The owner could at any time have withdrawn it, there being no lien for any price of its custody: and it was not thought that the bank had authority to remove it to a place of greater safety, without the orders of the owner. If it be possible to constitute a gratuitous bailment, or a simple deposit, this was one; unless the memorandum given by the cashier altered its character, or unless the nature of such a deposit is such as to have given the bank a right to derive profit from it; both of which points have been contended for by the counsel for the plaintiff:

As to the first of these points, supposing the bank to be answerable for any special undertaking of the cashier, we perceive no evidence of such an undertaking in this case. The writing signed by the cashier is merely a memorandum, signifying that the chest and its contents were left in the bank for safe keeping. It contains no promise, and assumes no risk, other than would be derived from the mere delivery without any writing. Nor does it receive any additional force from the presence of Mr. Orne, and his certificate of the gold having been weighed in his presence. For in this he did not act or sign officially; and if he had assumed to do so, it not being within the scope of his authority, as president, to charge the bank with any special liability, his act could not have bound the corporation, who, according to the practice as found by the jury, take no notice of special deposits. And the same may be said of the memorandum signed by the cashier. For if he had undertaken to make the bank specially answerable for a deposit, contrary to its usage and to the nature of the contract implied by accepting such a deposit, such an undertaking, without previous authority or subsequent assent, would have failed to implicate the bank.

We think also that there is nothing in the nature of such a deposit, or in the usages of banks, or in the act incorporating the bank, from which any qualities can be attached to this bailment, which do not belong to that class of contracts generally, where the advantage is wholly on the side of the depositor.

It was contended that the bank might discount on this property. But if the true nature of a special deposit is understood

by us; and we think its character is properly described in the special verdict; we are of opinion this could not be done. For although the bank, by implication, are allowed, in the act of incorporation, to have credit upon the simple amount of all the monies deposited for safe keeping; we are satisfied that the legislature had reference to general deposits only in this provision. It does not appear that this or any other bank ever issued notes upon the credit of special deposits: indeed they could not, as the amount of such deposits, or the value of them, is generally wholly unknown to the directors of the company. The eighth section of the incorporating act, we think, clearly shows that the deposits referred to in the third section are general deposits. For in the eighth section an annual account of the moneys deposited is required to be made to the governor and council, in order that it may be ascertained whether there has been an excessive issue of notes. Now of special deposits no such account can be rendered, because none is kept: and we have never heard that any bank has been complained of, as violating its charter, for not rendering an account of such deposits.

We see then no profit to the bank, arising from special deposits, unless it be, as was suggested, that they acquire an increased credit with the community on their account. But any credit founded upon such deposits would be fallacious, since they cannot be meddled with by any officer of the bank, although authorized by a vote of the corporation, without a breach of trust which would subject them to an action. As to the idea suggested, that the business of a bank may be facilitated and increased by the accommodation given to special depositors; the advantage, if any, is too minute and remote to affect their liability.

Such deposits are indeed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling houses or stores; and this is rendered more probable from the well known fact, that not only money or bullion, but documents, obligations, certificates of public stocks, wills and other valuable papers, are frequently, and in some banks as frequently as money, deposited for safe keeping.

This is wholly different from the deposits contemplated in the act, on which notes may be issued: for they enter into the capital

stock, become the property of the bank as much as their other moneys, and the bank become debtors to the depositors for the amount.

31y. The contract in the present case being then only a general bailment, the third question to be discussed is, whether the contract has been executed by the bank. I use the word bank for the corporation, consisting of the president, directors and company, for the sake of brevity.

The rule to be applied to this species of bailment is, as has been stated, that the depositary is answerable, in case of loss, for gross negligence only, or fraud which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred from any thing found by the verdict: for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. The want of books, showing the number and amount of deposits, is not a culpable negligence: for the acceptance of the deposit being voluntary, the bank was not obliged to incur any labour or expense in this respect: and besides, the agent of the depositor required nothing but a memorandum from the cashier; and this was more than he could have insisted on as a right.

As to the supposed neglect and carelessness of the directors, in not inspecting the cashier's accounts more strictly, so as to have detected his fraudulent management of the books to cover his peculation, this concerned the property of the company, not that of special depositors: and the reputation of the cashier, and general confidence in him, found by the verdict, is a sufficient answer to any charge of negligence in his original appointment or continuance in office.

We have thus prepared the way for the discussion of the great question in the case, and we believe the only one on which doubts could be entertained.—The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent; as the distinction is not important in this case; the question being whether there was gross negligence, and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. Fraud on property deposited, committed by the depositary, or his servants acting under his authority, express or implied, relative to

the subject matter of the fraud, is equivalent to gross negligence, and renders the depositary liable. No fraud is directly imputed to the bank; it being found that the directors, who represent the company, were wholly ignorant of the transactions of the cashier and chief clerk in this respect.

The point then is narrowed to this consideration, whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers: and here, it being thought there was some discrepancy in the authorities, we have felt ourselves obliged to examine minutely all which have been cited, and all others having a bearing on the question.

It was contended by one of the counsel for the plaintiffs as a proposition universally true, that the principal is civilly answerable for all frauds done by his agents; and he is supported in the use of this language by a doctrine of Lord Kenyon in the case of Doe v. Martin, and also by Lord Ellenborough in 1 Camp. 127. And yet it must strike the mind of every man of sense, that this universal proposition will admit of, and indeed upon principles of common justice actually requires, considerable qualifications. No one will suppose, if my servant commits a fraud, relative to a subject that does not concern his duty towards me, that I shall be civilly answerable for such fraud. If I send him to market, and he steps into a shop and steals, or upon false pretences cheats the shop keeper of his goods; I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire: and yet the proposition, as stated, will embrace a case of this kind. The proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his principal or master: and this was the state of things in both the cases, which are cited to support the proposition; and they go upon the principle of an implied authority to do the act.

The rule of law is correctly laid down by Sir William Blackstone [1 Comm. 429.] viz. "that the master is answerable for the act of his servant, if done by his command, either expressly given or implied." And in another place, "if a servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service; otherwise

the servant shall answer for his own misbehavior." [Ibid. 431]. The same rule will apply more strongly to frauds practised by the servant. Christian, in a note to this passage, approves this doctrine, and illustrates it with some observations of his own.

The Supreme Court of the United States recognizes the same doctrine in the case of The Mechanics Bank vs. The Bank of Columbia, 5 Wheat. 326, in which it is said that the liability of the principal depends upon the facts, 1. That the act was done in the exercise, and 2. Within the limits, of the powers delegated. Any act, they say, within the scope of the power or confidence reposed in the agent, such as money credited in the books of the teller of a bank, or proved to have been deposited with him although he omits to credit it. And in the case of Ellis v. Turner, & al. 8 D. & E. 533, Lord Kenyon says, "the defendants are responsible for the acts of their servant, in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he, being master of the defendants' vessel, were to commit an assault upon a third person in the course of his voyage." And upon the same principle it has been holden, that if a servant wilfully drive his master's carriage against the carriage of another, the master is not liable for the damages. [1 East 106.] And the reason is the same; for in such case there is no authority from the master, express or implied; the servant in that act not being in the employment of his master. In the case here referred to the master was not in the carriage at the time: the law would have been the same, if he had been present, and had endeavoured to prevent the act; the presence of the master being only presumptive evidence of authority.

I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The case of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule, founded on public policy.

We are then to enquire whether in this case, when the gold was taken from the cask by the cashier and clerk, they were

in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it; and so could not lawfully communicate any authority: and that they did not in fact give any, is found by the verdict. Nor did they in any manner assent to, or have any knowledge of it. There are no circumstances, then, from which such authority can be implied. The chest or cask, when once placed in the vault, was to remain there until taken away by the owner or ordered away by the bank: either party having a right to discontinue the bailment. It was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier, than of any other officer or person, to know the contents, or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault, when banking hours were over; that this, together with other property there, should be secure from theft. He cannot therefore be considered, in any view, as acting within the scope of his employment, when he committed the villainy: and the bank is no more answerable for this act of his than they would be, if he had stolen the pocket book of any person, who might have laid it upon the desk, while he was transacting some business at the bank.

If it be asked, for what acts then of a cashier or clerk the bank would be answerable; I should answer, for any which pertain to their official duty; for correct entries in their books, and for a proper account of general deposits; so that, if by any mistake, or by fraud, in these particulars, any person be injured, he would have a remedy. If they should rob the vaults of the property of the bank, the company would necessarily lose; as must have happened in this case to a great amount: and if the bank have become debtors to those who have deposited otherwise than specially, their debts will not be diminished by the fraud; so that in this form they are answerable to depositors: and for the correct conduct of all their servants, in their proper sphere of duty, they are answerable. They may also possibly be answerable for notices to endorsers upon bills and notes left with them for collection, if there should be a failure, by the neglect of any of their servants: because they have undertaken to give the proper notices. But even in that case it may admit of a

question, whether they would be liable any further than attornies, who undertake the collection of debts, would be. But they are not answerable for special deposits, stolen by one of their officers, any more than if stolen by a stranger; or any more than the owner of a warehouse would be, who permitted his friend to deposit a bale of goods there for safe keeping, and the goods should be stolen by one of his clerks or servants.

The undertaking of banking corporations, with respect to their officers, is that they shall be skillful and faithful in their employments: they do not warant their general honesty and uprightness.

And it is the same with individuals. If a friend commit to my care valuable property to keep for him, and it be stolen by my servants, I shall not be answerable for the loss; as was stated by Lord Kenyon, in the case of Finnucane v. Small. This case, before referred to for another purpose, deserves special notice upon this point: for if it be law, it goes the whole length of the case before us, and even beyond it; for the bailee there received a reward for his custody of the goods, which were stolen. The plaintiff was an officer in the army, and being about to leave London, sent his trunk to the defendant's house for safe custody, and was to pay one shilling per week for house room. When he returned he received the trunk, but the contents had been stolen. Lord Kenyon held the defendant not liable, it appearing that he had taken as much care of the trunk, as he had of his own goods; and that if the goods were stolen by the defendant's servants, as was stated to have been the fact by the plaintiff's counsel, it would make no difference. His lordship no doubt considered the hire agreed to be paid, as mere compensation for house room, not as a reward for diligence and care; and therefore did not require of the defendant more care, than he used about his own goods, considering it as a simple deposit only. Whether he was right or not in this, there is no doubt of the correctness of his opinion with respect to the agency of the servants in the theft: for they were not in the course of their duty, when pilfering the trunk of its contents. Garrow and Shepherd, eminent sergeants, and since judges, acquiesced in the opinion.

This case is, in all respects, like the one before us, except that the goods were to be kept for hire; and the difference is altogether in favour of the defendants in the present case.

In answer to this case it was observed by the counsel for the plaintiffs that the cashier of the bank was trusted, and therefore the doctrine of Lord Kenyon did not apply. But if we are right in the principles before stated, he was not trusted in this business; neither he nor his principal, the bank, having anything to do with the chest or cask, but to give it a place in the vault, and to lock it up, when the hours of business were over; and so the cashier must be considered like the servant in the case cited.

Some stress was laid in the argument, upon the security taken by the bank of the cashier, for the faithful discharge of his duty. But we think it obvious, that nothing was contemplated in the security, but the official neglects of the cashier. The act of incorporation authorizes the bank to require bonds, in a sum of not less than ten thousand dollars; and a bond was taken in that sum only. Now considering this as one of the oldest banking companies in one of the most wealthy towns in the commonwealth; without doubt special deposits of a vast amount were from time to time received into the bank for safe keeping, and a bond for ten thousand dollars could never have been taken, to indemnify against a possible loss of these.

Upon a view therefore of all the points in the case, and after a careful attention to the arguments and authorities, we are satisfied that, upon the special verdict, judgment must be entered for the defendants.[1]

[1] "So far as this decision rests upon the principle that the depositary is liable only for gross negligence it is sound law. In other respects the conclusion reached seems to be open to question. If such facts were now presented for the first time, the case would doubtless be solved upon consideration of the nature of the relation between the bank and the cashier. Was he, it would be asked, acting within the scope of his employment in receiving and protecting the special deposit? If so, the bank was liable for his embezzlement, to the same extent as if the fund had been misappropriated by the cashier to the use of the bank itself. . . . In reason it is clear that the depositary is liable where the servant, employee, or officer who commits the depredation is himself charged on behalf of the principal with the duty of oversight. Notwithstanding (this criticism) Foster v. Essex . . . has been generally approved in America, and the same principle has been declared in England." 2 Street, Found. Leg. Lia. 277.
See also 29 L. R. A. 92.

WHITNEY & WIFE v. LEE, 8 Metc. (Mass.) 91.

(1844)

The bill of exceptions, on which this case came before the court, and which was signed by the judge before whom a trial was had in the court of common pleas, was as follows:

"This was an action of assumpsit upon a voluntary undertaking of the defendant, without reward, to secure and take care of a promissory note given by Jonathan Whitney to the female plaintiff while sole. The note aforesaid was placed in the hands of the defendant, for the purpose aforesaid, and the plaintiffs contended that the defendant was bound to use ordinary care and fidelity in securing and collecting the same. The court instructed the jury that the plaintiffs must prove fraud or gross negligence in the defendant, to entitle them to recover. The verdict was for the defendant, and the plaintiffs excepted to the said instructions."

SHAW, C. J. The present case depends on the rule of law applicable to bailments. The facts, as we understand them, are, that the plaintiffs delivered to the defendant a promissory note, payable to the female plaintiff, whilst sole upon a voluntary undertaking of the defendant, without reward, to secure and take care of the same. The term to "secure" may be deemed ambiguous, meaning either to obtain security, or to keep securely; but associated with the words "take care of," and being a gratuitous undertaking, we do not understand that the defendant was to take active measures to obtain security, but simply to keep the note carefully and securely, and receive the money due thereon, when offered. This last authority and duty would seem to result from the custody of the note.

Under these circumstances, the court are of the opinion that the instruction of the judge to the jury was right, and that to enable the plaintiffs to recover, they must prove fraud or gross negligence in the bailee. By fraud must be intended any want of good faith, or such utter disregard of the rights of the owners of the note, as indicates bad faith.

The law has endeavored to make a distinction in the degrees of care and diligence to which different bailees are bound; distinguishing between gross negligence, ordinary negligence, and slight negligence; though it is often difficult to mark the line

where the one ends and the other begins. And it must be often left to the jury, upon the nature of the subject matter, and the particular circumstances of each case, with suitable remarks by the judge, to say whether the particular case is within the one or the other.

Subject to these remarks upon the application of these distinctions, we think it well settled, that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or gross negligence. This rule was settled, on great consideration, and after full deliberation, in Foster v. Essex Bank, 17 Mass. 479; and this supersedes the necessity of any full review of the authorities.

Exceptions overruled.

SPOONER v. MATTOON, 40 Vt. 300.

(1868)

Assumpsit in a special count, and a count for money had and received. Plea, the general issue, and trial by the court by consent of the parties at the May Term, 1866. Barrett, J., presiding. The plaintiff gave evidence tending to support his declaration, and thereby proved that both he and the defendant were soldiers in the 4th Vermont regiment, and in March, 1865, were with the army near Petersburgh, Virginia; that the plaintiff, in the early part of that month, had considerable money, and fearing that it might not be safe in his own custody during the nights, he had, for one or two nights previous to the 4th day of March, delivered it to the defendant privately for safe keeping, and early the following morning had called on the defendant, at the defendant's tent and taken it back. On the night of the 4th day of March, he delivered it in like manner to the defendant for safe keeping, and the defendant received the same for that purpose, and kept it through the night, and immediately after breakfast the next morning, being Sunday, the defendant, as the plaintiff had not come for the money, took it, in the pocket book containing it, which was of unusual large size and length, from the place in which he kept it through the night,

and started for the plaintiff's tent, which was ten rods distant from the tent of the defendant, and having no convenient pocket for so large a pocket book, he put it inside of his vest, between that and his shirt, intending, as he himself said, to keep his mind upon it all the way to the plaintiff's tent; that on his way he forgot himself, but when he had got within a rod of the plaintiff's tent, he bethought himself in respect to the pocket book, and put his hand inside of his vest to take it out, so as to have it ready to deliver to the plaintiff as soon as he entered the plaintiff's tent, and it was not there, and as he said, it had slipped out on his way. Immediately search was made for it in the track he had pursued, and in the tent of the defendant, and inquiry was made of the inmates of the defendant's tent, but it was not found. The amount of money entrusted to the defendant, and lost to the plaintiff, was $775.00, and the same was lost on the 5th day of March, 1865. For that sum, with interest, the court rendered judgment for the plaintiff,—to which the defendant excepted.

PROUT, J. The county court, upon the evidence which is detailed in the bill of exceptions, found that the defendant was not only lacking in the exercise of ordinary care with respect to the amount of money the plaintiff seeks to recover in this action, but that he is chargeable with actual negligence, and rendered a judgment for the plaintiff.

The facts showing that the money in the defendant's hands was a simple depositum, or naked deposit, for the sole benefit of the plaintiff, and that it was left with the defendant without any special undertaking on his part, as well as without expectation of reward, the principle applicable to, and which must govern the case, is at once indicated. In a bailment of this nature, the bailee is bound to exercise only slight diligence, and is responsible only for gross neglect. It is said this rule accords with reason as well as abundant authority, as in the case of a bailment of this nature, the accommodation is to the bailor, and the entire advantage to him. Foster et al. vs. Essex Bank, 17 Mass. 479; Story on Bailments, §§ 23, 62; 1 Parsons on Contracts, 570, 571; 2 Kent's Com. 560.

The decision of the county court does not seem to meet the requirement of this principle, but is put upon the distinct ground

of a want of ordinary care on the part of the defendant, and that upon the evidence, he is chargeable with actual neglect, without reference to the character and nature of the bailment in question, or the degree of negligence on the part of the defendant necessary to be proved or found in order to charge him. There are different degrees of care and diligence, (which it is unnecessary to define), a neglect or want of which, results in different degrees of negligence, applicable to and growing out of different kinds of bailment, as all the books treating of the subject show. In this case, and with respect to the bailment in question here, the court held that the defendant was bound to exercise ordinary care— a greater degree of diligence than the law required him to exercise—and was chargeable with actual negligence, but which they do not find to be gross.

But looking at the case in the light of the evidence, although it was admissible and proper to be considered as bearing upon the question of slight diligence and gross neglect on the part of the defendant, it does not necessarily amount to, or show that the defendant was in fault as to either, to the extent or degree those terms import. Desirous of relieving himself of the care of the plaintiff's money—the plaintiff not calling for it as accustomed—before he was obliged to leave his tent in the performance of his duties, he started for the tent of the plaintiff, with the intention of returning it to him. For the purpose of not exposing it to view, having no pocket large enough to contain it, he placed it inside and between his shirt and vest, intending to keep it secure by the pressure of his arm upon it. On the way, his attention is diverted,—as he expressed it, he forgets himself with respect to the money, as anyone naturally might in camp, and when he is in this mental condition, it slips out, and is lost. The county court, upon the proof, expressly exclude the inference that the defendant embezzled it. Upon this evidence, and excluding this inference, we are unwilling to hold that it shows gross negligence on the part of the defendant, as it is equally consistent with an honest intention and effort on his part to return the plaintiff his money.

The judgment of the county court is reversed, and judgment for the defendant.

SCHERMER v. NEURATH, 54 Md. 491.

(1880)

A verdict was rendered for the plaintiff under the instructions of the Court for $124.55, and judgment was entered thereon, with interest and costs. The plaintiff appealed.

ROBINSON, J., delivered the opinion of the court.

This is an action by the appellant to recover the value of four United States coupon bonds of the value of $1000 each, and one bond of the value of $500 which were left with the appellee for safe-keeping, and which were afterwards stolen by a female thief, known as Mary Miller.

The evidence shows that after an absence of several years in Europe, the plaintiff returned to Baltimore in October, 1875, and stopped at the house of the defendant, his brother-in-law. He had on his person at the time the bonds in question, enclosed in an envelope, and the envelope in his pocket-book. Being about to retire to his bed-room, he asked the defendant whether he should take the bonds with him, to which the defendant replied "that he thought it would be safer to leave them with him." Whereupon the plaintiff handed the bonds to the defendant, and the latter in the presence of the plaintiff put them in a small wooden box, in which he kept his valuable papers, and locked the box, and put the box in a bureau drawer in his bed-room and locked the drawer.

The defendant's house is at the corner of Park and Fayette Streets, and the first floor on both streets, is occupied by stores and shops, one of which being the defendant's shoe shop.

The second floor was occupied by the defendant and used for a parlor, dining-room and kitchen, and the third story for bed-rooms. The main entrance was on Park Street.

The plaintiff remained as a guest in the defendant's house for about two weeks, and, being about to go to North Carolina on a visit, he asked the defendant for his bonds; but, upon the suggestion by the latter that it was safer to let them alone, he consented to let them remain. On the same day he took from defendant a receipt describing the numbers and amounts of each bond, and stating that they were left by plaintiff with defendant for safe-keeping.

After his return from North Carolina, the plaintiff went to defendant's house for the purpose of cutting off the coupons then due. They went up stairs together, and the defendant unlocked the bureau drawer, took out the small box, unlocked it, and handed the bonds to the plaintiff. The coupons were cut off by the latter, and, in his presence the defendant again placed the bonds in the box and locked it, and put the box in the bureau drawer, and then locked the drawer.

The plaintiff continued to reside in Baltimore, but nothing more was said about the bonds, until April following, when it was discovered that they, together with defendant's papers and jewelry, had been stolen.

Mary Miller, the thief, in her testimony, fully explains the manner in which they were stolen. She says: "About ten o'clock in the morning she left the house where she was staying, and walked around the city. About five or six o'clock she passed the house of the defendant, went up stairs, and found the doors up stairs open. Went first into the front room and found the bureau drawers open, then went into the adjoining room and found the second drawer of the bureau in that room locked. She broke the lock and took out the small box, and broke the lock of the box, and took out the plaintiff's bonds and the defendant's papers. She then went into the front room and took three watches and some jewelry, and then left the house without seeing any one."

It appears, also, that some time before the theft by Mary Miller, the defendant, without the knowledge of the plaintiff, deposited the $500 bond with Wilson, Colston & Co., as collateral security for money borrowed. He subsequently, however, paid to the plaintiff $526.25, the amount due on the face of the bond with interest to date.

The declaration contains three counts, one for trover and two for negligence.

In granting the defendant's, and in refusing to grant the plaintiff's prayers, the Court substantially instructed the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover under either count in the declaration.

After a careful examination of all the evidence offered by the plaintiff, we are obliged to say, that in our judgment it was not legally sufficient to warrant a jury reasonably to find, either

that the bonds were lost by the actionable negligence of the defendant or that they had been converted to his own use.

The proof shows that the bonds were left with the defendant for safe-keeping, without any reward or profit, and that he agreed to take care of them solely for the accommodation of the plaintiff; that he put them in a box in which he kept his own valuable papers, and put the box in the bureau drawer in his bed-room, and that both box and drawer were locked; that this was done with the knowledge and consent of the plaintiff, and that they remained there with his consent. Under these circumstances the plaintiff cannot reasonably say, there was any negligence in regard to the place in which the bonds were kept. If this be so there is no evidence to show that they were subsequently lost by any wrongful act or fault of the defendant. He was not required, of course, to keep the doors of the chamber rooms in the third story locked in the day time, much less could he be required to keep watch against such a bold and daring theft as this.

There is a well recognized distinction in regard to the care and diligence required of a bailee for hire, and one who undertakes to keep property without reward, and solely for the accommodation of another. In regard to the former, the liability is one founded on contract, and the bailee is obliged to exercise that care and diligence which is ordinarily exercised by persons in regard to the business or thing committed to his care; or as put in some of the cases defining the liability of a paid agent, he is responsible for the consequences of the "want of ordinary diligence," or which is the same thing, for "ordinary negligence."

In the case of a bailee without reward there is no contract, and he is liable only for wrongful conduct, or according to the expression used in many cases, gross negligence.

So long ago as the celebrated case of Coggs vs. Bernard, 2 Lord Raymond, 909, Holt, C. J., held, that a merely gratuitous bailee or other agent was liable only for gross negligence. See also Shiells v. Blackburne, 1 Hy. Blackistone, 158. The terms "gross and slight negligence," have, it is true, been the subject of some criticism of late, on the ground of not being legal terms, and not importing a precise and definite idea of actionable negligence, for which a bailee may be liable. And in Wilson vs. Brett, 11 Meeson & Welsby, 115 Baron Rolfe said, he "could

see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet."

But be this as it may, in Maury and Osbourn v. Coyle, 34 Md., 235, this Court has laid down in explicit terms what seems to us the most satisfactory rule or test, by which the liability of unpaid bailees is to be determined, namely, that he is bound to observe such care in the custody of property committed to his keeping, as persons of ordinary prudence in his situation and business, usually bestow in the custody and keeping of like property belonging to themselves.

Want of ordinary diligence is of course as a general rule a question for the jury.

But where the proof offered by the plaintiff is wholly insufficient to justify a jury reasonably to find the want of such ordinary diligence, it is within the province of the Court to so instruct the jury.

And as we have heretofore said, the proof in this case being legally insufficient to prove actionable negligence on the part of the defendant, the rulings of the Court in this respect must be affirmed.

The only remaining question is whether there is any evidence to support the count in trover? And in support of this count, it was argued that the conversion by the defendant to his own use, of the bond for $500, was in law a conversion of the other four bonds of $1000 each. The argument then goes so far as this, that when a half dozen articles, separate, and independent of each other, are delivered at the same time to a bailee, the conversion of one is the conversion of the whole, and this too, although the bailee was able and willing upon demand to return the other articles or property not taken.

We must confess we do not exactly see upon what principle this contention can be supported. Cases may be supposed, it is true, in which the conversion of part of a thing would be in law the conversion of the whole, provided the part so converted affected the whole. But to say that because the defendant took one bond and converted it to his own use, that this worked a conversion of the remaining bonds, would be to allow a fiction to prevail against the truth.

Nor do we find that any of the cases cited by the plaintiff sustain this position. In Richardson vs. Atkinson, 1 Strange, 576,

where part of the liquor was drawn off, it was held to be a conversion of the whole, because the defendant had filled the vessel with water.

But in Philpott vs. Kelly, 3 Ad. & El., 106, where a pipe of wine was left with the bailee for safe-keeping, and he caused part of the wine to be drawn off, and then used part of it after it was bottled, it was expressly held, that this did not constitute a conversion of the whole.

The use of the $500 bond by the defendant was of course a breach of faith, and for its conversion he was unquestionably liable under the count in trover, but the conversion of this bond was neither in law nor in fact a conversion of the other bonds which remained untouched in the place where they were deposited. * * *

PRESTON v. PRATHER, 137 U. S. 604; 11 S. Ct. R. 162.

(1890)

Action for the value of certain U. S. bonds of about $12,000 face value, purchased for plaintiff by defendants and kept as a special deposit under a special agreement. The bonds were stolen by defendants' assistant cashier. Judgment for plaintiffs.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

By the defendants it was contended below in substance, and the contention is renewed here, that the bonds being placed with them on special deposit for safe-keeping, without any reward, promised or implied, they were gratuitous bailees, and were not chargeable for the loss of the bonds, unless the same resulted from their gross negligence, and they deny that any such negligence is imputable to them.

On the other hand, the plaintiffs contended below, and repeat their contention here, that, assuming that the defendants were in fact simply gratuitous bailees when the bonds were deposited with them, they still neglected to keep them with the care which such bailees are bound to give for the protection of property placed in their custody; and further, that subsequently the character of the bailment was changed to one for the mutual benefit of the parties. * * *

Undoubtedly, if the bonds were received by the defendants for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See Steamboat New World v. King, 16 How. 469, 474, 475; Railroad Co. v. Lockwood, 17 Wall. 357, 383; Milwaukee & St. Paul Railway v. Arms, 91 U. S. 489, 494. The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employees and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment.

Thus, in Foster v. Essex Bank, 17 Mass. 479, 9 Am. D. 168, the bank was, in such a case, exonerated from liability for the property entrusted to it, which had been fraudulently appropriated by its cashier, the Supreme Judicial Court of Massachu-

setts holding that he had acted without the scope of his authority, and, therefore, the bank was not liable for his acts any more than it would have been for the acts of a mere stranger. In that case a chest containing a quantity of gold coin, which was specified in an accompanying memorandum, was deposited in the bank for safe-keeping, and the gold was fraudulently taken out by the cashier of the bank and used. It was held, upon the doctrine stated, that the bank was not liable to the depositor for the value of the gold taken.

In the subsequent case of Smith v. First National Bank in Westfield, 99 Mass. 605, 611, 97 Am. D. 59, the same court held that the gross carelessness which would charge a gratuitous bailee for the loss of property must be such as would affect its safe-keeping, or tend to its loss, implying that liability would attach to the bailee in such cases, and to that extent qualifying the previous decision.

In Scott v. National Bank of Chester Valley, 72 Penn. St., 471, 480, 13 Am. R. 711, the Supreme Court of Pennsylvania asserted the same doctrine as that in the Massachusetts case, holding that a bank, as a mere depositary, without special contract or reward, was not liable for the loss of a government bond deposited with it for safe-keping, and afterwards stolen by one of its clerks or tellers. In that case it was stated that the teller was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks, but this fact was not allowed to control the decision, on the ground that it was unknown to the officers of the bank that the teller gambled in stocks until after he had absconded, but at the same time observing that:

"No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal

step, which ends in ruin to himself and to those whose confidence he has betrayed."

As stated above, the reasonable care which persons should take of property entrusted to them for safe-keeping without reward will necessarily vary with its nature, value and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.

It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stock of their assistant cashier who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court to its conclusion that they were guilty of gross negligence. It was shown that about a year before the assistant cashier absconded the defendant Kean, who was the chief officer of the banking institution, was informed that there was some one in the bank speculating on the Board of Trade at Chicago. Thereupon Kean made a quiet investigation, and the facts discovered by him pointed to Ker, whom he accused of speculating. Ker replied that he had made a few transactions, but was doing nothing then and did not propose to do anything more, and that he was then about a thousand dollars ahead, all told. It was not known that Ker had any other property besides his salary. His position as assistant cashier gave him access to the funds as well as

the securities of the bank, and he was afterwards kept in his position without any effort being made on the part of the defendants to verify the truth of his statement, or whether he had attempted to appropriate to his own use the property of others.

Again, about two months before Ker absconded, one of the defendants, residing at Detroit, received an anonymous communication, stating that some one connected with the bank in Chicago was speculating on the Board of Trade. He thereupon wrote to the bank, calling attention to the reported speculation of some of its employees, and suggesting inquiry and a careful examination of its securities of all kinds. On receipt of this communication Kean told Ker what he had heard, and asked if he had again been speculating on the Board of Trade. Ker replied that he had made some deals for friends in Canada, but the transactions were ended. The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed. Upon this subject the court below, in giving its decision, Prather v. Kean, 29 Fed. Rep. 498, after observing that the defendants knew that Ker had been engaged in business which was hazardous and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous peculations, embezzlements, forgeries and thefts plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur.

The second position of the plaintiffs is also well taken, that, assuming the defendants were gratuitous bailees at the time the bonds were placed with them, the character of the bailment was subsequently changed to one for the mutual benefit of the parties. It appears from the findings that the plaintiffs, subsequent to their deposit, had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and that such discounts

were made. When the notes thus secured were paid, and the defendants called upon the plaintiffs to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously. The plaintiffs had already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as securities for such overdrafts. From these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and the accounts show that they did subsequently overdraw in numerous instances.

The deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties, that is to say, both were interested in the transactions. For the bailor it obtained the loans, and to that extent was to his advantage; and to the bailee it secured the payment of the loans, and that was to his advantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence. * * *

It follows, therefore, that whether we regard the defendants as gratuitous bailees in the first instance, or as afterwards becoming bailees for the mutual benefit of both parties, they were liable for the loss of the bonds deposited with them. And the measure of the recovery was the value of the bonds at the time they were stolen.

Judgment affirmed.

WETHERLY v. STRAUS, 93 Cal. 283.

(1892)

Appeal by the defendant from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

HARRISON, J. The plaintiff deposited with the defendant on the third of September, 1888, for safe-keeping, a certificate of deposit that had been issued to her own order. On the next day an action was commenced by one Haviland, representing certain assigned claims (one of which was assigned by the defendant) against the firm of Bannister & Wetherly, and under a writ of attachment issued in said action a garnishment was served upon the defendant against the certificate of deposit that had been left with him by the plaintiff. The defendant gave no notice to the plaintiff of these proceedings until after she had demanded the certificate on the 14th of September, when he told her that it had been attached, and that he could not give it to her. Thereupon she brought this action for damages sustained by his conduct. The defendant, in his answer, alleged that the money represented by the certificate was the property of the plaintiff's husband, defendant in the above suit, and that the deposit was made and the certificate issued to her only as the agent and trustee of her husband, and that after it had been deposited with him the garnishment above named had been served upon him, and that he had ever since the 14th of September held the certificate under and pursuant to said writ of attachment and garnishment. * * * The jury rendered a verdict in favor of the plaintiff. * * *

The defendant, having received the certificate as a mere depositary for safe-keeping, was bound to deliver it to the plaintiff on demand, unless he had a lien upon it, or was forbidden or prevented from doing so by the real owner or by the act of the law, and had given the notice required by section 1825 of the Civil Code. (1822) The only excuse given for not delivering it was the garnishment served upon him in the suit against the husband. It is not claimed that the appellant (defendant) gave or attempted to give the plaintiff any notice of such garnishment until after she had made the demand, and her testimony that at the time of depositing the certificate with him she informed him of her place of residence was not disputed by him.

A bailee can assert a jus tertii in an action by the bailor only when he defends on such title, and by the authority of such third person. (Palmtag v. Doutrick, 59 Cal. 168; Dodge v. Meyer, 61 Cal. 423.) When the bailor has obtained the property by some fraud practiced upon the true owner, the bailee can,

upon the authority of such true owner, or when he has been forbidden to make delivery of the property, defend upon such true owner's title; but he always assumes such defense at his peril, and takes upon himself the burden of showing the right to retain the property under such instructions.

In the present case the appellant does not pretend that the husband has given him any authority to make the defense, but his claim to retain the certificate is based upon his other claim, that the money as well as the certificate was never given to the plaintiff, but was held by her for her husband as his agent, and that a garnishment therefor against the husband has been served upon him; and the only ground upon which, in his answer, he justified his refusal to deliver it to the plaintiff is, that ever since the 4th day of September, 1888, he has held, and does now hold, said certificate "under and pursuant to said writ of attachment, and the said notice and command of said sheriff as aforesaid." Such right to hold the certificate depends entirely upon his ability to prove that it belonged to her husband, but the evidence showing that the husband had given the money to the plaintiff destroyed the defendant's right to retain the certificate under this claim. * * *

The judgment and order denying a new trial are affirmed.

PATTERSON, J., and GAROUTTE, J., concurred.[1]

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3. RIGHTS OF BAILEE (Depositary).

PRESTON v. NEALE, 12 Gray (Mass.) 222.

(1858)

Action of contract on two counts: 1st, For use and occupation

[1] Redelivery or Delivery over. "Upon the termination of a bailment the identical thing bailed, or the product of or substitute for that thing (i. e. identical thing in the same or in an altered form) must be redelivered, delivered over, or accounted for by the bailee in accordance with the contract, unless he has sufficient excuse for failure to do so." 5 Cyc. 199.

Exceptions: (1) Grain stored in public warehouse. Hall v. Pillsbury, 43 Minn. 33; 8 Harv. L. Rev. 432. (2) Certificates of stock. Taussig v. Hart, 58 N. Y. 425. (3) Goods in possession of factor. Norwegian Plow Co. v. Clark, 102 Ia. 31.

Money is not an exception to the general rule, as are grain and stock, but in order to be a bailment the identical money delivered must be returned. Maine Bank v. Thomas, 28 Ill. 463; Davis v. Smith, 29 Minn. 201; In re State Bank, 56 Minn. 119; Rozelle v. Rhodes, 116 Pa. St. 129; Shoemaker v. Hinze, 53 Wis. 116.

of certain rooms; 2d. Upon an account annexed, which included a charge for storage of certain goods.

It appeared that both counts were for the same cause of action; that when the defendant quitted the premises hired of the plaintiff, he left there two or three trunks and a stove, which were in the plaintiff's way, and she was obliged to remove them from one place to another, until the time of bringing this action. The defendant offered evidence tending to show a demand upon the plaintiff for said goods, some time after he left the premises, and contended that the plaintiff had no lien for storage, and therefore could not recover for storing the goods, after such demand. But the judge instructed the jury that the plaintiff had a lien upon said goods for storage, and that as the demand had not been accompanied with any offer or tender of payment therefor, she could recover a reasonable compensation for subsequent storage, if the jury found that she had furnished it. The plaintiff did not claim a lien by virtue of any special agreement or as an innkeeper or keeper of a warehouse. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

The exception to the ruling, that the plaintiff had a lien on the trunks and stove left in her house by the defendant, is sustained. It is not shown nor alleged that these things were left in her house with her consent. She therefore became an involuntary depositary of them. And we are of opinion that the law which is applied to cases of deposits by the finding of goods lost on land, and deposits of property made by the force of winds or floods, (which Judge Story terms involuntary deposits,) is to be applied to this case. In those cases the law gives no lien to the depositary for his care and expense in the keeping and preservation of the property. Story on Bailments, §§ 44 a, 83 a, 121 a. 3 Steph. N. P. 2690. Armory v. Flyn, 10 Johns. 102. Yet if the loser offer a certain sum as a reward to him who will restore the property, a lien thereon is thereby created, to the extent of the reward so offered. Wentworth v. Day, 3 Met. 352. Wilson v. Guyton, 8 Gill, 213.

Although, in cases of the deposits above mentioned, the depositaries have no lien on the property, yet we are of opinion that they are legally entitled to compensation for the care and expense of keeping and preserving it. Mr. Dane doubted this. 2 Dane Ab. 270. But in the section last above cited from Story

on Bailments, it is said of these deposits, that "the question may arise as to the right of the depositary to be paid his necessary and reasonable expenses for preserving and keeping the property. It is certain that at the common law he has no lien therefor; but the just doctrine seems to be, although perhaps there is no direct and positive adjudication, that the depositary may rightfully claim and recover such expenses in an action." In Nicholson v. Chapman, 2 H. Bl. 258, Chief Justice Eyre said, "a court of justice would go as far as it could go, towards enforcing payment." See also Addison on Con. (2d ed.) 444; 2 Kent Com. (6th ed.) 636; Reeder v. Anderson, 4 Dana, 193; Baker v. Hoag, 3 Barb. 208. There is also an ancient authority on this point, to wit, Doctor and Student, c. 51, where is this passage: "Though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after when he will. And if any man in the mean time put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found; but he shall have no property in them, no more than in goods found."

In the present case, which we hold to be, in its legal incidents, like deposits by finding, or made by winds or floods, we think the plaintiff is entitled to recover for storage of the trunks and stove, from the time when they were left in her house, until the time when the defendant made a demand on her for them. But as she, having no lien on them, wrongfully withheld them from the defendant, on his demand, she is not entitled to compensation for subsequent storage during such unlawful detention. And as the jury were instructed that the plaintiff was entitled to recover compensation for storage after the demand made of the goods by the defendant, we grant a new trial.

Exceptions sustained.[1]

[1] Is a finder of goods entitled, either to compensation, or to a lien, for expenses incurred in saving or for improvements added to chattels found? The beginning of the law upon this point will be found in Nicholson v. Chapman, 2 H. Bl. 254 (1793). In this case timber belonging to the plaintiff was accidentally swept away by a tide. This was found later, and was removed to a place of safety by the defendant. Plaintiff demanded the same, but defendant refused to deliver it up unless paid a certain sum. Plaintiff sued in trover and recovered. The court (Eyre, C. J.) held that the defendant had no lien, and there-

4. TERMINATION.

FARROW v. BRAGG'S ADM'R., 30 Ala. 261.

(1857)

"The defendant then pleaded, in short by consent, non assumpsit, and set-off. It appeared by the testimony, that in the early part of the year 1853, and while said Bragg was in life, one Thomas F. Murphy, who was his agent, wishing to get a slave belonging to said Bragg, named Nias, out of the town of Salem, and into the country, on account of the slave's feeble health, and to keep him from getting into difficulties, placed him in the possession of the defendant, who lived in the country, under an understanding and agreement that said defendant was to take care of him, keep him until called for and pay nothing for his hire during the time he might have him; that Bragg himself, some short time afterwards, when informed of what Murphy had done, ratified and confirmed it; that defendant kept the slave until the close of the year, and then sent him to said Adair, who was then the special administrator of said Bragg; that Bragg died in May of that year; that neither he in his lifetime, nor his said special administrator after his death, ever called upon defendant for said slave, or made any demand, except as above stated. It further appeared from the proof, that on the day said special administrator was appointed, (which was at a regular term of the probate court of Russell,) and after his appointment, but before he had given bond and qualified, he agreed to hire to said defendant two other slaves belonging to said estate, named Jack and Ransom, until an administrator in chief should be appointed, (which the parties supposed would

fore was guilty of conversion, and also suggested that he had no legal right to compensation, although "a court of justice would go as far as it could go towards enforcing the payment." See also, 62 Cent. L. J. 105, and general authorities on quasi contracts.

A trespasser may sue a third person. Anderson v. Gouldberg, 51 Minn. 294.

As to the rights of a finder against the owner, and as to the rights of a finder against third persons, see Gray, Cases on Property, Vol. I., 280-306.

Use. "Where the bailment is for the sole benefit of the bailor, the bailee may not use the property for his own purposes, or needlessly expose it, or derive any benefit therefrom": except as it may be necessary for its preservation and for the benefit of the rightful owner. 5 Cyc. 179.

be done at the next term of said probate court,) at an annual hire of $8 per month; but that after the next regular term of said probate court, and before an administrator in chief was appointed, said Adair took both of said slaves out of defendant's possession against his objection.

"The court thereupon charged the jury, that if they believed the evidence, in regard to the manner in which the defendant received and held the slave Nias, the law then made him the bailee of Bragg, and he was not chargeable with hire while said Bragg lived, and did not call for him; but that the bailment terminated upon Bragg's death, and the defendant became liable to pay his administrator reasonable hire, from that day forth until he gave him up, without the administrator calling for the slave, or demanding him from the defendant; and that a demand by the administrator was not necessary to charge the defendant with hire.

"The court further charged the jury, that if they believed the evidence, in regard to the hiring of the other two slaves by the special administrator, after his appointment, but before he gave bond and qualified; and that he took them away contrary to the wishes of the defendant, and before the time agreed upon,—yet, nevertheless, he was entitled to recover of said defendant reasonable hire for them during the time he kept them."

The defendant excepted to these charges; and he now assigns as error all the rulings of the court to which, as above stated, he reserved exceptions.

STONE, J. In the case of Raiford v. Upson, 29 Ala. 188, we held, that an agreement by which one party received from another a family of slaves, (a part of whom were too small to labor, and others sickly), to be boarded for their work, would constitute a valid contract of hiring, if entered into in good faith. That case would be an authority for holding in the present suit, that the agreement under which appellant obtained the possession of the slave Nias, amounts to a contract of hiring, if any definite time had been agreed on. The agreement, however, being that Farrow should keep him until called for, and pay nothing for his hire, forbids that we should so hold. A possession, thus acquired, might, in the discretion of the owner, continue for one or for five years, or it might be terminated in one hour. We

think this was not a contract, on which either party, before entering upon its performance, could have been sued for its breach. Like all other gratuitous promises, no right of action could arise from its non-observance.—Edwards on Bailments, 120-1; ib. 58.

If the property delivered in this case had been any other species of chattel, all would at once agree that it was that description of bailment called deposit, or depositum.—Edwards on Bailments, 35, 47. We cannot perceive from the terms of the agreement that the bailee stipulated to do more than keep the slave for the use of the bailor. He did not agree, so far as the evidence discloses, to do any act about the slave. True, he impliedly bound himself to feed him; but the same thing would be true if he had received any other animal on deposit.

It may be reasonably implied from the facts in this case that the bailee had the right to use and employ the slave Nias. This view is not at all inconsistent with the character of the bailment as a deposit. Such use is always permissable, where the consent of the depositor is actually given, or can be reasonably presumed from the circumstances.—Edwards on Bailments, 89.

As we have seen, an agreement to make or receive a deposit or mandate is not a contract. It is without consideration. It may be disregarded, or retracted by either party, so long as it remains purely executory. It is a mere power, revocable by either party; and the death of either, before performance is entered upon, operates a revocation.—Edwards on Bailments, 120. The agreement, however, assumes a new character as soon as the deposit or mandate is received. It then ceases to be a mere power, and becomes a contract.—Edwards on Bailments, 58, 109-10.

The slave Nias being placed with appellant as a deposit, and the gratuitous promise being then raised to the dignity of a contract, by part execution, the death of the bailor did not put an end to it, or convert the bailee into a wrong-doer. After demand made, he would have been liable to an action; till then, if the contract be correctly set forth in the bill of exceptions, he was not liable for hire.—Edwards on Bailments, 83.

The charge of the court, in reference to the slaves Jack and Ransom, is equally indefensible. Adair, the special administrator, hired to the appellant, at an agreed price, the slaves last

named, until an administrator in chief should be appointed. He violated the contract, by taking away the slaves before the time of hiring expired. This defeats the plaintiff's right of recovery, unless the facts of this case exempt it from the operation of the rule.—Perry v. Hewlett, 5 Porter, 318; Petty v. Gayle, 25 Ala. 472.

It is contended that Adair, the special administrator, had no authority to make the contract he did in reference to the slaves Jack and Ransom; and that therefore the appellant is liable for hire for the time he had their services. The answer to this is, that Adair cannot set up his own want of authority. He instituted the present suit, and it is only continued in the name of the administrator in chief. He is estopped from denying his own authority to make the contract.—Pistole v. Street, 5 Porter, 64; Fambro v. Gantt, 12 Ala. 298; Swink v. Snodgrass, 17 Ala. 653.

There is nothing in the argument, based on the fact that the parties, in making the contract last above considered, supposed an administrator with general powers would be appointed at the next regular term of the probate court of Russell, and that the appellant was not disturbed in the possession until after the next regular term of the court. The contract was, that Farrow was to have the slaves until after the appointment of an administrator in chief; and his possession was terminated without his consent, before the happening of that event.

The charge of the circuit judge was in conflict with this opinion; and for the errors pointed out, the judgment of the court below is reversed, and the cause remanded.

RICE, C. J., not sitting.

KOWING v. MANLY, 49 N. Y. 192.

(1872)

Action to recover the value of nine United States seventy-thirty bonds of $1,000 each. Defendants as brokers had purchased the bonds for plaintiff, and they were left with them, under written instructions not to deliver the bonds to any person except upon his written order. The bonds were subsequently delivered by defendants to wife of plaintiff upon the presenta-

tion of an order purporting to be signed by plaintiff, which order defendants supposed to be genuine. The jury were directed to find a general verdict, and in addition to answer the following questions. They found as follows:

Q. 1. Is the signature to the order for the delivery of the bonds, dated January 6, 1866, the genuine signature of the plaintiff? A. No.

Q. 2. Did the plaintiff deliver the bonds in controversy to the wife of the plaintiff? A. Yes.

Q. 3. Did the plaintiff's wife fraudulently obtain a delivery of the bonds to her? A. Yes.

Judgment for defendant.

RAPALLO, J. The plaintiff having instructed the defendant not to deliver his bonds to any person, except upon his written order, the delivery of them without such order even to the plaintiff's wife did not operate as a discharge of the defendant's obligation to the plaintiff as bailees. 1 Stark. 104.

The inference of authority on the part of the wife to act as agent for the husband, which in some cases may be drawn from circumstances, is negatived in the present instance by the written instructions given by the plaintiff to the defendants.

But independently of any question of agency, it is claimed on the part of the respondents that because at common law the wife's possession of a chattel was deemed the possession of the husband, the delivery of the bonds to the plaintiff's wife was equivalent to a delivery of them to the plaintiff.

At common law a married woman could not own personal property. The title to all chattels owned by her at the time of marriage or acquired by her afterward vested in the husband, and her manual possession of them inured to his benefit. This was the right of the husband, which he could assert. It attached to all property which she rightfully acquired, and to all of which she possessed herself by his authority or with his cooperation. But she had no power to thrust such constructive possession upon him by her own wrong, not sanctioned by him, nor to make him responsible for it against his will and without his knowledge. If she, without his authority, purchased property (not necessaries) he was not responsible for it, though delivered to her, unless it came to his use, or some assent on his part was shown. Montague v. Benedict, 3 Barn. & Cress.

631; Bentley v. Griffin, 5 Taunt, 356; Metcalfe v. Shaw, 3 Campb. 22; Etherington v. Parrott, 1 Salk. 118.

If the delivery of chattels to the wife was in law a delivery to the husband in all cases, a tradesman need never have been at a loss for a remedy against the husband for goods sold and delivered to his wife, nor put to proof that they came to his use. So of a payment to the wife, of a debt due to the husband. According to the rule as claimed, the delivery of the money to the wife would be a delivery of it to the husband, and he ought not to be permitted to demand payment a second time. But no such effect was given to a payment to the wife. It did not bind the husband unless some authority to her to receive it as his agent appeared. Thrasher v. Tuttle, 22 Me. 335; Offley v. Clay, 2 Man. & Gr. 172.

As the delivery of the property to the wife without the assent of the husband would not create a direct liability from him to the party delivering it, it would seem clear that it would not discharge a previously existing liability from such party to her husband.

The cases cited by the counsel for the respondent in illustration of the proposition that the possession of the wife is the possession of the husband, are all cases in which the possession of the wife was lawful, and the husband or his representatives claimed the benefit of it. Those cases hold that the wife cannot acquire title to chattels by adverse possession as against the husband. Bell v. Bell's Adm'rs, 1 Ala. Sel. Cas. 465. That the title to slaves in possession of the wife under a bequest vests in the husband and survives to him, her possession being his. Machen v. Machen, 15 Ala. 373; Walker v. Fenner, 28 id. 367. So of money in possession of the guardian of the wife. 16 Ala. 343. But in all these cases the wife had acquired a property in the chattels which the law transmitted to the husband. Lord Coke in Co. Litt. 351b, points out this distinction. He says: "As to personal goods there is a diversity worthy of observation between a property in them and a bare possession; and that if personal goods be bailed to a feme, or if she find goods, or if goods come to her hands as executrix to a bailiff, and she taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against husband and wife." The husband is, at common law, liable to be sued jointly

with his wife for all torts committed by her prior to or during the coverture, and hence where she has wrongfully taken and converted personal property of another, the action must be against both husband and wife, though he be in fact innocent of any wrong, and never received any part of the property. Cro. Car. 254; Cro. Jac. 5. The liability of the husband in such a case does not rest upon the ground that he is in contemplation of law guilty of the taking of conversion, but results from the incapacity of the wife to be sued without her husband. Capel v. Powell, 17 C. B. (N. S.) 744. Where the husband and wife jointly took and converted goods, though both were liable for the wrongful act of taking them, the conversion was the act of the husband only, and was to his use only. Berry v. Nevys, Cro. Jac. 661; Keyworth v. Hill, 3 Barn. & Ald. 685; Bingham Inf. and Cov. 258; Marshe's case, 1 Leon. 312; Rhemes v. Humphreys, Cro. Car. 254. A feme with her husband cannot convert to the use of the wife, but all is done to the use of the husband. Perry v. Diggs, Cro. Car. 494. And it is said in 2 Saunders, 47, s, t, ed. of 1846, that where the wife before coverture had converted goods, if they remained in existence, and the husband refused to give them up on demand, this was a conversion by him for which an action would lie against him alone. But I apprehend it must be understood in this statement, that the goods had come under the control of the husband so that he could deliver them. All the authorities cited to show that in actions of trover against husband and wife, the conversion should be alleged to be by the husband, are cases where the husband and wife had jointly committed the wrong, or the property has come to his possession. So much of the cause of action as was founded upon the acquisition of property by the wrong-doer was against the husband alone. He could not convert property to the use of his wife; but she could aid him in taking and enabling him to convert it to his own use. The conversion was by the husband only and only to his use (Cro. Jac. 661; Cro. Car. 254, 494), and the action for the conversion might have been brought against the husband alone. 2 Wms. Saund. 47, s and t. But the action so far as it is founded upon the wrong done to the plaintiff by depriving him of his property, lies against both husband and wife when both are guilty. Therefore trover may be brought against husband

and wife where she was concerned. Marshe's case, 1 Lean. 312. The conversion in such case is by the husband alone, but the action lies against both, because both were concerned in the trespass of taking them. Bingham Inf. and Cov. 257, 258. In the earlier cases cited, judgments in action of trover against husband and wife for a joint conversion were reversed, because the declaration averred that the conversion was to their uses, instead of alleging it to the use of the husband; but in the later case of Keyworth v. Hill, 3 Barn. & Ald. 685, a declaration in trover against husband and wife, averring that the defendants converted the property to their own use, was held good after verdict, on the ground that trover would lie for a temporary conversion by the husband and wife, where no property was acquired by the wrong-doer, as where it was destroyed or passed over to another, and of this the wife might be guilty as well as the husband, and that after verdict it would be intended that the conversion was of that character.

In all these cases, it will be observed the husband was alleged to have participated in the wrongful act. But a married woman might alone be guilty of a conversion, and although the husband was a necessary party to the action, the allegation should be that she converted the property; and in such a case on writ of error in the Exchequer Chamber, a plea that the defendants were not guilty was held, after verdict, to have tendered an immaterial issue, and that the issue should have been only that the wife was not guilty and a repleader was ordered. Coxe v. Cropwell, Cro. Jac. 5; Slater v. Franks, Hobart, 126.

I have found no case in which the husband has been held individually liable as upon a conversion by him to his own use, where the property was wrongfully obtained by the wife, and he was not jointly concerned in the taking, or the goods did not actually come to his use. In the present case there was no evidence showing what became of the bonds after their delivery to the plaintiff's wife, or what disposition she made of them. It was not shown that they continued in her possession, or even that they remained in existence. She may have immediately passed them over to another, in which case there was no conversion to his use. Keyworth v. Hill, 3 B. & Ald. 685; Cro. Jac. 5. No facts were proven upon which, if the bonds had been the property of the defendants, an action for their con-

version could have been maintained against the husband alone, under any of the authorities cited.

The ancient rules, to which reference has been made, governing actions for goods wrongfully obtained by a married woman, are founded upon the common-law doctrine that a married woman could not acquire or own personal property. How far they are applicable under the existing laws of this State I have not deemed it necessary to discuss, as I am satisfied that even under the old law the evidence and findings would not establish a conversion of these bonds by the plaintiff, or any liability for them on his part other than that of being joined with his wife in an action for the tort committed by her. It is claimed however on behalf of the respondent, that the husband being liable for the tort committed by his wife in fraudulently obtaining the bonds, he cannot maintain an action founded on such tort.

The unsoundness of this position consists in the assumption that the liability of the husband to be joined with his wife, in an action for her wrong, is equivalent to a guilty participation by him in that wrong, or is founded upon the idea that her act is considered as his. Such is not the nature of his liability. He is not joined as a defendant on the ground that her guilt is imputed to him, but because so long as the marital relation continues the wife is incapable of being sued alone (Chapell v. Powell, 17 C. B. (N. S.) 744); and his liability continues only so long as the relation of marriage subsists. Id.

In trover against husband and wife for goods converted by the wife, the reason assigned for holding a plea that the defendants were not guilty to be bad, was that "no tort is supposed in the husband, and the issue should be only that she is not guilty." Coxe v. Cropwell, Cro. Jac. 5; Slater v. Franks, Hobart, 126.

If after the commission of a tort by a married woman she should be divorced or the husband should die, the action could be brought against her alone, and if the death of the husband occurred pending the action against both it would survive against the wife. But if she should die before or pending the action, it would not survive against the husband.

This could not be if her wrong were imputed to him, or he were in law unqualifiedly responsible for it.

But it is further contended that in this case the wife having obtained the bonds from the defendants by a fraud, and they being entitled to maintain an action against both husband and wife for this wrong, the same facts upon which the plaintiff relies to recover here would charge him in that action for the same amount, and that therefore to prevent circuity of action the law will bar a recovery by him.

We do not think that the present case falls within the principle of avoiding circuity of action to which the respondents refer in support of this claim. Where the circumstances are such that the defendant, if compelled to pay the demand of the plaintiff, would immediately be entitled to recover back from him the identical amount, it is well settled that to avoid circuity of action this cross liability will be allowed to operate as a defense. Carr v. Stephens, 9 B. & C. 758; Simpson v. Swan, 3 Campb. 291; Cuckson v. Stones, 1 E. & E. 248; Schloss v. Heriot, 14 C. B. (N. S.) 64.

But this rule can be invoked only when the parties opposed in interest use the same. Walmesley v. Cooper, 11 A. & E. 216. A covenant by the plaintiff not to sue the defendant may be set up in bar of the action, but a covenant by A. not to sue C. cannot be set up in bar of an action by A. and B. against C. A liability of the plaintiff jointly with another cannot be set up as a bar to a claim due him individually, nor can a conditional or defeasible liability bar one which is absolute and unconditional. A liability of one in a representative capacity cannot be set up against a demand belonging to him in his own right. To bring the case within the common-law rule, the liability of each party must be the equivalent of that of the other. 15 C. B. 62; 16 C. B. (N. S.) 829; 2 Hurlst. & Norm. 793; 11 Exch. 831; Beecham v. Smith, E. B. & E. 442.

It is very clear that in this case the liability of the plaintiff is very different in its nature and extent from that of the defendants. Their liability to him is absolute and unconditional. Should they die it would survive against their personal representatives. Should the plaintiff die it would survive in favor of his, but his cross liability would not survive against his representatives. The liability of the defendants is to the plaintiff alone. That of the plaintiff is only that of being joined with his wife as defendant, and this only so long as the marital rela-

tions continue. He can in no event be sued alone. If the wife has any separate estate, or should acquire one with the proceeds of the bonds, the judgment might be enforced against such estate, to the discharge of the husband's. In case of his wife dying or being divorced, before judgment, the plaintiff's liability to the defendants would cease while that of the defendants to the plaintiff would continue. To allow this defense would be equivalent to enforcing a right of action against the husband alone for a tort committed wholly by the wife, which cannot be done.

The judgment appealed from should be reversed and judgment entered for the plaintiff on the verdict, with costs.

All concur. Judgment accordingly.[1]

[1] Termination of bailment.—Like other contractual relations the bailment relation may be terminated—

A. By act of the parties.
   1. By the accomplishment of the bailment purpose or the expiration of the time for which the property was bailed.
   2. By the rescission of the bailment contract. This may be—
      (1) By mutual consent of bailor and bailee.
      (2) By redelivery of the chattel by the bailee.
      (3) By abatement of the contract by the bailor.

B. By operation of law.
   1. By change in the status of the parties.
   2. By change in the status of the bailed chattel.

Goddard, Outlines of Bailments and Carriers § 24.

CHAPTER III.

MANDATES

1. Creation.

THORNE ET AL. v. DEAS, 4 Johns. (N. Y.) 84.

(1809)

This was an action on the case, for a nonfeasance, in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New York to Camden, in North Carolina.

The plaintiffs were copartners in trade, and joint owners of one moiety of a brig called the Sea Nymph, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st December, 1804, on a voyage to Camden, in North Carolina, with William Thorne, one of the plaintiffs, on board, and was to proceed from that place to Europe or the West Indies. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between William Thorne, one of the plaintiffs, and the defendant, relative to the insurance of the vessel, in which W. Thorne, requested the defendant that insurance might be made; to which the defendant replied, "that he (Thorne) might make himself perfectly easy on the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to Daniel Thorne, one of the plaintiffs, "Well, we have saved the insurance on the brig." D. Thorne asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this, D. Thorne expressed his surprise, and observed, "that he supposed that the insurance had been effected im-

mediately, by the defendant, according to his promise, otherwise, he would have had it done himself, and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "he (D. Thorne) might make himself easy, for he would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st December, on the coast of North Carolina. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a non-suit on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one half of the cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

KENT, Ch. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case, is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party intrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement, enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir William Jones, in his "Essay on the Law of Bailments," considers this species of undertaking to be as extensively binding in the English law, as the contract of mandatum, in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret, that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case; but only some dicta (and those

equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument.

A short review of the leading cases will show, that, by the common law, a mandatary, or one who undertakes to do an act for another, without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred. Those who are conversant with the doctrine of mandatum in the civil law, and have perceived the equity which supports it, and the good faith which it enforces, may, perhaps, feel a portion of regret, that Sir William Jones was not successful in his attempt to ingraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground, that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur. (Inst. lib. 3, 27, 11.) But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject, is that of Watson v. Brinth, (Year Book, 2 Hen. IV. 3 b.) in which it appears that the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing had been commenced, and afterwards, by negligence, nothing done, it had been otherwise. Here the court, at once, took the distinction between nonfeasance and misfeasance. No consideration was stated, and the court required a covenant to bind the party.

In the next case, (11 Hen. IV. 33 a.) an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff, within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not binding without a speciality; but, says the case, if he had undertaken to build the house, and had done it illy or negligently, an action would have lain, without deed. Brooke, (Action sur le Case, pl. 40.) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, etc., and that in the above case, it is assumed that there was no sum of money, therefore it was a nudum pactum."

The case of 3. Hen. VI. 36 b. is one referred to, in the Essay on Bailments, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended, that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (Babington, Ch. J.) was in favor of the action, but he said nothing expressly about the point of consideration, and the third (Cokain, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving countenance to the present action, that Brooke (Action sur le Case, pl. 7, and Contract, pl. 6.) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise, it was a nude pact; and in Coggs v. Bernard, Mr. Justice Gould gave the same exposition of the case.

The general question whether assumpsit would lie for a nonfeasance, agitated the courts in a variety of cases, afterwards, down to the time of Hen. VII. (1 Hen. VI. 18 b. pl. 58. 19 Hen. VI. 49 a. pl. 5. 20 Hen. VI. 34 a. pl. 4. 2 Hen. VII. 11. pl 9. 21 Hen. VII, 41 a. pl. 66.) There was no dispute or doubt, but that an action upon the case lay for a misfeasance in the breach of

a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a nonfeasance, or non-performance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the dicta of the judges in them, go so far as to say, that an assumpsit would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a consideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41, and it is given as a loose note of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on the case for this nonfeasance, equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a nonfeasance for which an action on the case lies, he states a consideration paid. This case, however, is better reported in Keilway, 78. pl. 5., and this last report must have been overlooked by the author of the "Essay," Frowicke, Ch. J., there says, "that if I covenant with a carpenter to build a house, and pay him 20l, to build the house by a certain day, and he does not do it, I have a good action upon the case, by reason of the payment of my money; and without payment of the money in this case, no remedy. And yet, if he make the house in a bad manner, an action upon the case lies; and so for the nonfeasance, if the money be paid, action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the Essay on Bailments, is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of Mandates, in that Essay, I hazard nothing in asserting, that that part of the treatise appears to be hastily

and loosely written. It does not discriminate well between the cases: it is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended, that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which, a different rule had been adopted. The case of Wilkinson v. Coverdale, (1 Esp. Rep. 75) was upon a promise to cause a house to be insured, and Lord Kenyon held, that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance. In Smith v. Lascelles, (2 Term. Rep. 188.) Mr. Justice Buller said it was settled law, that there were three cases in which a merchant, in England, was bound to insure for his correspondent abroad.

1. Where the merchant abroad has effects in the hands of his correspondent in England, and he orders him to insure.

2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.

3. Where the merchant abroad sends bills of lading to his correspondent in England, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts.

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of misfeasance, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by Buller, to cases of nonfeasance, for so it seems to have been applied in Webster v. De Tastet. (7 Term Rep. 157.) They have, however, no application to the present case. The defendant here was not a factor or agent to the plaintiffs, within the purview of the law-merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. (Malyne, 81. Beawes, 44.) In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor, who transacted business for his principal,

who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might, possibly, have been different. I mean not to say, that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz., to procure the insurance of a vessel, and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, quoad hoc, a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said, that whenever one partner promises his copartner to do any particular act for the common benefit, he becomes, in that instance, a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.[1]

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2. Obligations of Bailee (Mandatary).

SHIELLS ET AL. v. BLACKBURNE, 1 H. Bl. 158. (1789)

The material facts of this case were as follows: The defendant who was a general merchant, in London, having received

[1] See, Barber v. Jones, 2 Can. L. Rev. 658; Commonwealth, etc. Co. v. Weber, etc. Co., 91 L. T. R. 813.

orders from his correspondent in Maderia to send thither a quantity of leather cut out for shoes and boots, employed Goodwin the bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, packed it for exportation, and sent it to defendant's house. Goodwin, at the same time, prepared another parcel of the same kind of leather, on his own account, packed it separately, and sent it along with the first parcel, together with bills of parcels. The defendant, voluntarily and without any compensation, by agreement with Goodwin, made one entry of both the cases, but did it under the denomination of wrought leather instead of dressed leather, which it ought to have been. In consequence the two cases were seized, and this action was commenced by the assignees of Goodwin to recover the value of the leather, which he had prepared to export on his own account. The declaration contained 1st. A count in special assumpsit; 2nd. A count for goods sold and delivered; 3rd. Quantum meruit. Plea, general issue. Verdict, for the plaintiff.

A rule was obtained to show cause why the verdict should not be set aside, and a new trial granted, on the ground that the defendant not professing the business of entering goods at the Custom-House, having undertaken to enter those in question without reward, and having taken the same care of them as of his own, was not liable for the loss.

Adair, Serjt., relied upon Coggs v. Bernard. Lawrence, Sergt., contra, said, The question is, how far the undertaking of the defendant is extended?

HEATH, J. (Mr. Justice Gould was absent.) The defendant in this case was not guilty of gross negligence or fraud; he acted bona fide. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person

who made it, and who acted to the best of his knowledge, to an action.

WILSON, J. Where money has been paid for the performance of certain acts, the person receiving it is by law, answerable for any degree of neglect on his part; the payment of money being a sort of insurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is gratuitous, and the party has acted bona fide, it is not consistent either with the spirit or policy of the law to make him liable to an action. Here Goodwin wanted to dispose of his goods, which the defendant entered together with his own, without any reward. Could he be understood to be answerable for more care than he took of his own goods? There was no suspicion of any fraudulent design. A wrong entry at the Custom-House cannot be considered as gross negligence, when, from the variety of laws relating to the Customs, reliance must be placed upon the clerks in the offices. It happened, indeed, not long since, that a man, designing to export wool under the late act (28 Geo. 3, c. 38), applied to a clerk in the Custom-House to make a proper entry of it, who, not understanding the Act of Parliament, entered it wrong, and the goods were seized; when therefore such cases happen, it is too much to infer gross negligence from the mistake which the defendant committed.

LORD LOUGHBOROUGH. I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom-House, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the Custom-House, such a mistake as this is not to be imputed to him as gross negligence.

Rule absolute for a new trial.[1]

[1] 17 Harv. L. Rev. 126.

TRACY ET AL. v. WOOD, 3 Mason (U. S. Cir.) 132; Fed. Cas. No. 14,130.

(1822)

Assumpsit for negligence in losing 764½ doubloons, entrusted to the defendant to be carried from New York to Boston, as a gratuitous bailee. The gold was put up in two distinct bags, one within the other, and at the trial, upon the general issue it appeared that the defendant, who was a money broker, brought them on board of the steamboat bound from New York to Providence; that in the morning while the steamboat lay at New York, and a short time before sailing, one of the bags was discovered to be lost, and that the other bag was left by the defendant on a table in his valise in the cabin, for a few moments only, while he went on deck to send information of the supposed loss to the plaintiffs, there being then a large number of passengers on board, and the loss being publicly known among them. On the defendant's return the second bag was also missing, and after every search no trace of the manner of the loss could be ascertained. The valise containing both bags was brought on board by the defendant on the preceding evening, and put by him in a berth in the forward cabin. He left it there all night, having gone in the evening to the theatre, and on his return having slept in the middle cabin. The defendant had his own money to a considerable amount in the same valise. There was evidence to show that he made inquiries on board, if the valise would be safe, and that he was informed, that if it contained articles of value, it had better be put into the custody of the captain's clerk in the bar, under lock and key. There were many other circumstances in the case. The argument at the trial turned wholly on the question of gross negligence, and all the facts were fully commented on by counsel. But as the case is intended only to present the discussion on the question of law, it is not thought necessary to recapitulate them.

STORY, J. After summing up the facts, said, I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from

one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant, as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case, if the plaintiffs had known him to be a very careless or a very attentive man. The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant, that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. In determining what is gross negligence, we must take into consideration what is the nature of the thing bailed. If it be of little value, less care is required, than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. So Sir William Jones lays down the law. "Diamonds, gold, and precious trinkets," says he, "ought from their nature to be kept with peculiar care, under lock and key; it would, therefore, be gross negligence in a depositary to leave such deposit in an open antechamber; and ordinary neglect, at least, to let them remain on the table, where they might possibly tempt his servants." So in Smith vs. Horne, (2 Moore's R. 18,) it was held to be gross negligence in the case of a carrier, under the usual notice of not being responsible for goods above £5 in value, to send goods in a cart with one man, when two were usually sent to see to the delivery of them. So in Booth vs. Wilson, (1 Barn. & Ald. 59,) it was held gross

negligence in a gratuitous bailee to put a horse into a dangerous pasture. In Batson vs. Donovan, (4 Barn. & Ald. 21,) the general doctrine was admitted in the fullest terms. It appears to me, that the true way of considering cases of this nature, is to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence usually take property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

The present is a case of mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care, than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiffs. Still if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.

Verdict for the plaintiffs for $5,700, the amount of one bag of the gold; for the defendant as to the other bag.

DOORMAN v. JENKINS, 2 Ad. & El. 256.

(1834)

Assumpsit. The first count of the declaration alleged that, in consideration that the plaintiff, at the request, &c., had de-

livered to the defendant and placed in his charge and custody a sum of money, to-wit, the sum of 32£. 10s., of the plaintiff, for the purpose, and in order that the defendant might therewith take up and pay for the plaintiff a certain bill of exchange made, &c., when the same should become due and be presented; and in consideration that the defendant then and there had the said moneys in his hands upon the terms and for the purpose aforesaid, the defendant undertook, &c., that he would with the said money take up, &c. Breach, that the defendant did not take up, &c., when the bill was presented for payment. The second count alleged that, in consideration that the plaintiff, at the request, &c., would deliver to the defendant the sum of 32£. 10s. of the plaintiff, provided by him for the purpose of taking up and paying a certain bill of exchange made, &c., (as before), the defendant undertook, &c., that he would take due and proper care of the said sum of money whilst in his hands in the meantime, and until the bill should become due, &c. Averment, that the plaintiff delivered the sum to the defendant for the purpose aforesaid. Breach, that the defendant did not take due and proper care; but, on the contrary took so little and such bad care, that afterwards, to-wit, &c., the said sum became, and was and is wholly lost to the plaintiff. The third count omitted all mention of the bill of exchange, but stated that, in consideration that the plaintiff, at the request, &c., had delivered the sum, &c., to be kept and taken care of by the defendant for the plaintiff, the defendant undertook, &c., to take due and proper care of the sum, &c., whilst under his charge. Breach, that the defendant did not nor would take proper care, &c.; but on the contrary thereof, whilst the same was in his charge, took so little and such bad care thereof, and conducted himself so negligently and improperly in the premises, that, &c., (loss as before). Counts for moneys, &c., and account stated. Plea, the general issue.

On the trial before Denman, C. J., at the London sittings in December, 1833, the plaintiff proved the delivery of the money to the defendant for the purpose of the bill being taken up as alleged in the declaration. The defendant was the proprietor of a coffee-house, and the account which he was proved to have given of the loss was as follows:—That he unfortunately placed the money in his cash-box, which was kept in the tap-

room; that the tap room had a bar in it; that it was open on a Sunday, but that the other parts of the premises, which were inhabited by the defendant and his family, were not open on Sunday; and that the cash-box, with the plaintiff's money in it, and also a much larger sum belonging to the defendant, was stolen from the tap-room on a Sunday. The defendant did not pay the bill when presented. The defendant's counsel contended that there was no case to go to the jury, inasmuch as the defendant, being a gratuitous bailee, was liable only for gross negligence; and the loss of his own money, at the same time as the plaintiff's showed that the loss had not happened for want of such care as he would take of his own property. The Lord Chief Justice refused to nonsuit the plaintiff, but took a note of the objection. The defendant called no witnesses. His lordship told the jury that it did not follow from the defendant's having lost his own money, at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence; but his lordship then said that the evidence of gross negligence was not, in his opinion, satisfactory. Verdict for the plaintiff. In Hilary term last, Sir James Scarlett obtained a rule to show cause why the verdict should not be set aside, and a nonsuit be entered, or a new trial be had.

TAUNTON, J. I have felt some doubt in this case; but, after the best consideration I can give it, I think the rule ought not to be made absolute. The counsel for the plaintiff properly admitted that, as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action would not be maintainable, except in the case of gross negligence. The sole question, therefore, is, whether there was any proof of such negligence. If there was, the application for a nonsuit, at any rate, cannot be granted; and it is almost (though not quite) equally clear that the defendant must be bound by the decision to which the jury has come. A great deal has been said on the point, whether the existence of gross negligence is a question of law or fact. It is not necessary to enter into that as an abstract question. Such a question will always depend upon circumstances. There may be cases where the ques-

tion of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly, and alleges that, from his failure so to do, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the Court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon, for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury. Without, therefore, laying down any abstract rule, we may, I think, with perfect safety, say that, in the present case, the question was entirely for the jury. It is fact, not law. The circumstances are extremely simple. The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (which I think perfectly immaterial), into the till of a public house. We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a prima facie case of gross negligence, which required an answer on the defendant's part. The phrase, "gross negligence," means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree. The case of Shiells vs. Blackburne, 1 H. Bl. 158, created at first some degree of doubt in our minds. It was said that the Court, in that case, treated the matter as a question of law, and set aside the verdict, because the thing charged, the false description of leather in the entry, did not amount to gross negligence; and therefore the jury had

mistaken the law. I do not view the case in that light. The jury there found, that in fact the defendant had been guilty of negligence; but the Court thought that they had drawn a wrong conclusion as to that fact. The case, therefore, does not stand against the conclusion to which I have come. It does not appear certainly from the report, how the case was treated at the trial, nor what the Judge said in summing up. But I do not find it laid down, as a rule, that in every case the question of negligence is to be matter of law. The ordinary practice is, to leave it to the jury, whether such negligence has been proved as the plaintiff has charged in his declaration. If the negligence so charged be insufficient to give a right of action, the defendant may move in arrest of judgment.

PATTESON, J. It is agreed on all hands that the defendant is not liable, unless he has been guilty of gross negligence. The difficulty lies in determining what is gross negligence, and whether that is to be decided by the jury or the Court. If the Court is to decide it, and no evidence has been given that satisfies the Court, there ought to have been a nonsuit. If the jury was to decide, I cannot feel a doubt that there was some evidence for them. I agree that the onus probandi was on the plaintiff. It appeared, by the evidence of what the defendant had said, that the money committed to his charge was laid in a box in the tap-room, which room was open on a Sunday, though the rest of the premises were not. Under these circumstances, there can be no nonsuit; for there was a sufficient cause to go to the jury. Whether, in the abstract, the question of negligence, be for the jury or the Court, I think it unnecessary, as my brother Taunton says, to determine. The present, at all events, was a question of fact, and therefore for the jury. The general question I approach with much diffidence. I do not know anything more difficult, than to say, in mixed questions of law and fact, what is for the Court, and what for the jury. In the present case, the principal doubt in my mind arose from the case of Shiells vs. Blackburne, 1 H. Bl. 158. The facts in that case were not disputed. It appeared that the defendant, being employed (without reward) to send out some dressed leather, entered it at the Custom House, together with some dressed leather of his own, as wrought leather, in consequence of which the whole was seized. Whether that amounted to gross negligence,

must have been a question for the jury. The report does not say how they were directed, nor whether the judge told them that, in his opinion, it was gross negligence. At first I conceived that nothing appeared from the report, except that the Court thought it was not a case of gross negligence. But, on looking into the case, I find the Court thought that the jury had found the fact erroneously, and sent the issue to another jury. So that, in the present case, the only remaining question is, whether the judge left the question properly. At first, I understood that the question left had been, whether the defendant had used ordinary and reasonable care, which, although it may be a useful criterion in determining the question whether there has been gross negligence, is certainly not the same question. But it seems that his lordship left it to them to say, whether there had been gross negligence; and that what he had said respecting ordinary care, was merely by way of illustration. We cannot, therefore, disturb the verdict. Whether I should have found the same verdict, is quite immaterial.

WILLIAMS, J. The only question before us is, whether the Judge should have said that the case was not made out on the part of the plaintiff, or should have left it to the jury? If the Judge be obliged to lay down a rule, it is extremely difficult to discover what that rule ought to be. Who can say where "gross negligence" begins? Can it be other than a question of fact? The case was properly left to the jury. The report of Shiells vs. Blackburne, 1 H. Bl. 158, does not state how the case was submitted to the jury. In Reece vs. Righy, 4 B. & Ald. 202, which was an action against an attorney for negligence, Abbott, C. J., left it to the jury to say, whether, under the circumstances, the defendant had used reasonable care and diligence; he did not take it from their cognizance, and pronounce his own opinion; and the verdict was not disturbed. In Moore vs. Mourgue, 2 Cowp. 479, where the defendant was charged with negligence in insuring at a wrong office, Lord Mansfield states his own direction thus:—"My direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted malâ fide, they should find for the plaintiff." In that case, again, we see that the Judge did not take into his own hands, as a question of law, what was gross negligence and what not; and there the Court above would not

grant a new trial. On the facts which were before the Judge, in the present case, it would have been impossible for him to pronounce a rule. It is a question of less importance, whether, under the particular circumstances, there was any evidence to go to a jury; but I think there was. Whether there was enough to satisfy their minds properly, is another question: one man's judgment is satisfied with a certain degree of evidence, another's mind with less; but I question if it can be said that the manner in which this money was left in the tap-room, was not loose custody. At all events, there was evidence for a jury.

LORD DENMAN, C. J. It appeared to me that some degree of negligence was clearly proved in the first instance. I thought, and I still think, it impossible for a judge to take upon himself to say whether negligence is gross or not. I agree to all the legal doctrine in Shiells v. Blackburne, 1 H. Bl. 158, which is, that a bailee without reward is not liable to an action without proof of gross negligence. I do not find a word there to the effect that the judge is to say whether, in fact, negligence is gross or not. I certainly did not take the view which the jury did of this case, and I pressed, as strongly as possible my opinion upon them. Whether, if I had heard all they said to each other, and had possessed all their experience, I should have changed my opinion, I cannot say; but certainly the question was for them.

Rule discharged.[1]

WILSON v. BRETT, 11 M. & W. 113.

(1843)

CASE.—Plea, not guilty.

At the trial before Rolfe, B., at the London Sittings in this term, it appeared that the plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others in playing the game of cricket; and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times,

[1] Davis v. Tribune Co., 70 Minn. 95.

and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. The learned Judge, in summing up, left it to the jury to say whether the nature of the ground was such as to render it a matter of culpable negligence in the defendant to ride the horse there; and told them, that under the circumstances, the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it; and that, if they thought the defendant had been negligent in going upon the ground where the injury was done, or had ridden the horse carelessly there, they ought to find for the plaintiff. The jury found for the plaintiff, damages, 5£. 10s.

PARKE, B.—I think the case was left quite correctly to the jury. The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use; if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it.

ROLFE, B.—The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability. I said I could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence.

Lord Abinger, C. B., and Alderson, B., concurred.

Rule refused.

RICHARDSON v. FUTRELL, 42 Miss. 525.

(1869)

Error to the Circuit Court of Hinds county. Hon. John Watts, judge.

Futrell sued Richardson in an action of assumpsit. The declaration contains two counts; the first is on a receipt in the words and figures following:

"$6850. Yazoo County, Miss., January 23, 1863.
"Received of M. J. Futrell, six thousand eight hundred and fifty dollars, to be invested for him in negroes as my judgment may direct, and to be accounted for by me.

"E. Richardson."

—and alleges that Richardson did not invest the money, and has failed to account for it. The second count is for work and labor, and for money lent to the amount of $6850.

Defendant pleaded non assumpsit and payment, with special notice that proof would be introduced that the money received by Richardson was "Confederate money"; that part of it was invested in slaves for plaintiff, and the remainder kept by Richardson for plaintiff at his request, and which defendant was always ready and willing to pay over and account for, when called upon. * * *

Defendant testified: That Futrell had been in his employment as overseer; that he settled with him every year, and gave note for any balance due him. On January 1st, 1862, he had a settlement, and owed plaintiff $7,108.31, for which he gave his note. In the latter part of 1862, after getting plaintiff to agree to take Confederate money for his debt, defendant sold his cotton for Confederate money, and in January, 1863, went to his plantation to pay off plaintiff, taking the necessary amount of money with him; plaintiff seemed loth to receive it; as he had entered the army, he said he did not know what he could do with it; made no objection to it on the ground that it was Confederate money; that he, defendant, counted out the money, and believes it was in plaintiff's presence; paid plaintiff $1000; retained balance on the agreement to invest the same in negroes for plaintiff, and executed receipt herein mentioned, whereupon plaintiff de-

livered up defendant's note for $7,108.31; that he did buy negroes from Watkins, under this agreement, for plaintiff, who, being dissatisfied with them, defendant kept them himself; that he afterwards bought from Mrs. Bradford a negro woman and children, of which he notified plaintiff; that plaintiff did not object to this purchase, but directed defendant to make no more investments for him, but to keep the money till he called for it, or directed him what to do with it. This, defendant did, always having on hand money to pay up, subject to plaintiff's order. Defendant further stated, that the negroes were bought from Mrs. Bradford, in Huntsville, Alabama; that at the time they could not be moved, for the reasons that the woman was in the family way, and would soon be confined; that they were to be sent to plaintiff as soon thereafter as practicable, of all which he told plaintiff fully; that not long afterwards, the Federal army occupied North Alabama, after which it was impracticable to get them to plaintiff's possession. Defendant further testified, that plaintiff never called on him for the money, nor directed him what to do with it; that at the request of plaintiff's wife he paid her $400 in April, 1865, in Confederate money; that he did not invest any more of plaintiff's money, but kept it on hand ready for plaintiff when called for; cannot say that he kept the identical bills, but the same kind of money, and in amount always on hand sufficient to pay plaintiff.

The jury found in favor of plaintiff $5,207.41 damages.

SHACKELFORD, C. J., delivered the opinion of the court. * * *

The next instruction objected to is the second, which is in these words: "If the jury believe from the evidence, that by the statements made between plaintiff and defendant in January, 1863, the defendant agreed to invest the sum, he was found to be indebted to plaintiff in negroes, and that by the terms of that agreement, defendant was to exercise that discretion in good faith, and to exercise care and prudence in the matter, and consult the real interest of plaintiff; and if the jury believe from the evidence, that defendant did make a partial purchase of negroes for plaintiff under such agreement, yet, if defendant managed the matter in so negligent a manner as that plaintiff realized no advantage from the purchase, the defendant is not entitled to charge plaintiff with the amount of such purchase."

The receipt of Richardson to Futrell for the money to be invested in negroes for Futrell, creates a case of bailment known as a mandate, which is defined to be "a contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward." Story on Bailments, ch. 3, § 137, pp. 130 et sequitur. According to the general principles regulating contracts of this kind, "a mandatary, as the contract is wholly gratuitous, and for the benefit of the mandator, is bound only to slight diligence, and of course is responsible only for gross neglect. This is the doctrine of the common law universally applied to mandates." Id. ch. 3, § 174, pp. 167-8.

The court below seems to have lost sight of the doctrine of mandatary bailments just adverted to, in suffering this instruction to go to the jury without specifying the kind of negligence the plaintiff in error should be made liable for.

The instruction is too broad. It was in evidence before the jury that the plaintiff in error had made two purchases for the defendant in error. One he (Futrell) had declined to take; the other he was certainly notified of: by his own admission it is proven that he was in possession of all the information that Richardson had. He was advised of the purchase soon after it was made, also the reasons why the negroes were not delivered or brought to defendant in error: this last fact was communicated to him at the time he informed Richardson to purchase no more negroes.

Then there was also a question of acquiescence to be considered by the jury; certainly Richardson could not be responsible for the invasions of the Federal armies into the district of country where the negroes purchased of Mrs. Bradford were.

Richardson could be held responsible, with as much propriety, for the loss of these negroes, had he transported them immediately to Mississippi from Alabama to his plantation, where the family of defendant in error was living during the war, and though no actual delivery by Richardson had been made to Futrell, and while there on his plantation, the federal forces had captured them, or prevented their removal.

Without any proof of the repudiation of this purchase, the jury were authorized to find against the plaintiff in error, and hold him responsible for his outlay for the negroes purchased

from Mrs. Bradford. There was no proof of such negligence in this second purchase warranting such a broad and unqualified direction to the jury to find against the plaintiff in error.

It is in direct conflict with the well-settled doctrine governing this kind of bailment, and it was error to give the instruction without modification.

The third and fourth instructions given and objected by plaintiff in error contain mere abstract principles of law, and should have been refused, as they are not made applicable to any supposed state of facts appearing in the case, being therefore irrelevant, and calculated to embarrass or mislead the jury.

The next instruction objected to and given for the defendant in error is the sixth, which is as folows: "An agent who receives money for investment for another, failing to make the investment, is bound to account for the money; and if the particular funds are going down in the market, and likely to become worthless, the agent is bound to return, or offer to return, the funds to his principal. The agent is bound to use such diligence in that matter as a prudent person would use in his own affairs."

After the defendant in error instructed plaintiff in error not to invest any more of his money in negroes, the plaintiff in error was no longer Futrell's agent to invest the money so held by him; but held it as a deposit, subject to the order and control of Futrell.

The character of the bailment having been thus changed by the order not to invest, ect., Richardson became a mere depositary of the funds uninvested of Futrell.

Judge Story defines this kind of bailment to be "a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust." Story Bailment, § 41, ch. 3, p. 41.

The duties of a depositary are, that he shall keep it with reasonable care, and that he shall, upon request, return it to the depositor, or otherwise deliver, according to the original trust. Story on Bailments, ch. 2, § 61. "Such bailee is only liable to slight diligence, and therefore not answerable, except for gross neglect." Ib. ch. 2, § 62. And he must take reasonable care of the deposit.

These rules are well settled in this character of bailments.

The plaintiff in error, after the notice from Futrell in June, 1863, was directed not to make any more investments in slaves, but to keep the money. Richardson's testimony about the notice differs from Futrell's in this, that Richardson "was to keep it for him until he called for it, or directed him what to do with it." This statement, in addition to what Futrell said relative to this order, does not affect the responsibility of Richardson to Futrell. There can be no question as to the legal effect of the order. The fund was certainly as much under the control of Futrell after he gave Richardson notice not to invest any more of it in negroes, as if he had instructed Richardson "to keep it until he called for it, or instructed him what to do with it." Richardson's version of the order.

If the money in the hands of Richardson, belonging to Futrell, was notes of the Confederate States, or Confederate money, there being testimony in the case that it was Confederate money, Richardson was not under any obligation to return, or offer to return the funds in his hands to Futrell, because the "particular funds were going down in the market, and likely to become worthless."

It is shown by the testimony in the case, that both parties were residents of the State of Mississippi, one of the States constituting the "so-called Confederacy," and each party had the same opportunities and facilities to find out the depreciation of the Confederate notes. Richardson was not bound to use any other diligence than to safely keep the funds in his hands; and if the defendant in error neglected to intruct the plaintiff in error what to do with the funds, he must bear the loss caused by the depreciation of the kind of funds alleged to have been deposited by Futrell in the hands of Richardson.

There being no evidence that Richardson gave notice to the defendant in error that the Confederate money was depreciating, or that he offered to return the same, the jury were, under this instruction, bound to find for Futrell, if they believed the funds were Confederate money. It is clear that this instruction is in conflict with these views of the law, and could hardly have failed to mislead the jury in their consideration of the evidence before them, relative to the deposit of the funds in Richardson's hands. For these reasons we think the instruction should not have been given. * * *

It is insisted by counsel for plaintiff in error, that the fifth instruction asked for Richardson, and refused, should have been given. It is in these words: "It was not necessary that Richardson should have kept the specific notes belonging to Futrell separate and apart from his own; but it was a compliance with his receipt, if he at all times kept on hand a sufficient sum of the same kind of money to pay over to plaintiff, or invest for him."

There was no special deposit of any particular Confederate notes made by Futrell; the testimony touching this point shows that there was only a general deposit of the money; that Richardson at all times had a sufficiency of Confederate notes on hand to pay the amount received, whenever demanded: this was all he could be required to do.

It should have been given by the court, and it was error to refuse it. * * *

For the errors before stated, the judgment will be reversed, the verdict set aside, and the cause remanded for a new trial.

MARINER v. SMITH, 5 Heisk. (Tenn.) 203.

(1871)

FREEMAN, J., delivered the opinion of the Court.

Ths suit is brought to recover from plaintiff in error the value of $900 in gold, or said sum, as there are several counts in the declaration, deposited by Smith with the firm of Mariner & Curtis, in the city of Memphis, in August, 1866. Suit was commenced against the other member of the firm, Curtis, but no process served on him, and suit dismissed as to him.

The material facts on which the questions presented in this record are raised, are substantially as follows:

The said firm was a house in the city of Memphis engaged in the boot and shoe business. Smith was in Memphis in August, 1866; went to the house of the firm, and deposited with their clerk and book-keeper, Wright, $900 in gold, which was counted by Wright, and put into the safe, as we assume, in the presence of Smith. The next day witness, Sherrod, saw Mariner, at the request of Smith, and instructed him, for the plaintiff below, to sell the gold if the premium rose to 50

per cent. If it did not, to keep it until Smith returned from Mississippi, where he was going, and return it to Smith. Mariner made no objection to the deposit, and promised to sell the gold on the terms indicated, but expressed his doubts as to the premium rising to the sum required.

The money was stolen from the safe, and, on return of Smith, in eight or ten days, he applied for it, and learned of its loss. Mariner stated to Smith at the same time that he had never seen the gold, and supposed their porter had stolen it. It seems at the same time this money was stolen, other moneys were taken belonging to a Miss Curtis, a sister of Curtis the member of the firm. Mariner stated also that he had arrested the porter for the supposed theft, but he had been discharged for the want of proof. He had also employed detectives to endeavor to discover the thief, but they had failed to do so. There were, perhaps, other moneys of the firm taken from the safe at the same time. The proof shows, too, that the firm kept their valuable papers, as well as money, in the safe, and gave the usual care and attention of business men to the safety of their money and papers.

The case must turn here on the charge of the Circuit Judge. The questions presented for his decision involved the liability of a bailee without reward, for simple mandatary, and of a bailee for reward; and whether in this case there was a contract for hire, either express or implied, and if so, what was the amount of diligence required of such bailees.

He stated to the jury, that if the bailment was a mere deposit without reward, the defendant would only be bound to ordinary diligence, and in case of loss by theft or otherwise, would not be liable. He then adds, "the law of bailments without reward holds the bailee bound to such diligence as a prudent man would exercise in his own affairs." This was all very well; but he continues, "if the nature of the bailment was of such character as to require extraordinary care and responsibility on the part of the bailee, the law will imply reward;" and winds up the sentence by saying, that "if this was a bailment for a fee or reward, express or implied, the defendant would be bound for ordinary negligence or apparent negligence, and plaintiff would be entitled to recover."

We know of no rule of law on the subject of bailments which would hold a party liable for mere apparent neglect. Certainly, in every class of bailments, the negligence required to fix liability, whether the law in the particular case holds the party responsible for slight or gross negligence, must be real, actual failure to perform the duties imposed on the bailee by the contract into which he has entered; and mere apparent negligence, which was not real, would not fix responsibility upon him.

The undertaking of a mandatary, or bailee without compensation, is sometimes laid down to be a trust, which imposes upon the bailee fidelity in its execution as a trustee. We think it is better defined by the simple idea of a contract, by which the party undertakes to do what is agreed between himself and the bailor, and that the liabilities of the bailee and rights of the bailor grow fairly out of the elements that make up that contract, to be ascertained by the express terms of the contract, as explained by all the surrounding and attending facts and circcircumstances of the case. As in this case, if it be assumed that the undertaking of the parties to keep the gold, and invest or return it, was without reward, then the terms of the contract, as defined by this undertaking and its attendant circumstances, would have been, that as it was placed in his safe with his own money and papers, that it should be kept in that place of deposit, and such care taken of it as would or ought to be given by an ordinarily prudent man of the deposits of like character placed in the same place of deposit. As a matter of course, the amount of care and precaution to be taken of the deposit, must necessarily be largely influenced by the greater or less value of the article deposited, and such naturally would be the understanding of the parties at the time, and would be an element of the contract as made, founded on such understanding.

This idea is sustained by opinion of McKinney, J., in case of Colyar, trustee, v. Taylor, 1 Col., 378. He says: "The degree of care required of a mandatary, is essentially dependent upon the circumstances of the case. The general principle governing his liability is indeed the same in all cases, but its application is materially affected and varied by the circumstances of each particular case. The bailors trusting him with the goods, is a sufficient consideration to require of him careful

management. We hold, therefore, the sound principle in such cases to be, that the liability of bailee without reward, is to be determined by a performance bona fide of the fairly understood terms of the contract, ascertained by the express contract, explained by the surrounding and attendant circumstances, or of the failure to perform the terms of said contract, as it was understood by the parties at the time.

It is sometimes said, rather loosely, that such bailee is only responsible for gross negligence. This we think, as remarked by Rolfe R. in case of Wilson v. Brett, 11 Meeson & Welsby, 113, cited in Smith's L. Cases, vol. 1, 421, is "nothing more than negligence with the addition of a vituperative epithet."

Any neglect of the fairly understood terms of the contract, as above explained, by which the deposit was lost, would subject the bailee to liability for the injury resulting from such neglect, whether it might be characterized by the term gross, or a less forcible word. Yet it must be neglect to perform the stipulations and undertaking of his contract, that shall create this liability. We think a very sound and correct view of the liability of such bailee, or persons to whom goods are delivered without reward, is given in Smith's L. Cases, "that the legal ground of such liability when goods are delivered, for injury or loss to the goods, is pretty much the same as that of one to whom they are not delivered, but from whose negligence or carelessness injury has ensued to them, or loss been sustained by the owner." The gist of the plaintiff's right of recovery in all such cases, is violation of contract, and injury to the bailor, resulting from such violation.

His Honor the Circuit Judge charged the jury, that if the nature of the bailment was of such a character as to require extraordinary care and responsibility on the part of the bailee, the law will imply reward, etc. We think this was not a correct statement of the law in reference to the facts of the case. The law might or might not imply a reward under the circumstances indicated. It would depend upon the fact whether the jury could gather from the surrounding facts and circumstances that it was so understood by the parties; for if the bailee received the deposit, however valuable, or however much care and responsibility might be involved in its proper keeping, yet if he undertook to keep it gratuitously, or the jury can fairly see

that such was the intention and understanding of the parties at the time of making the contract, or of the bailment, then the law would not, against such intention or understanding, imply a right to reward for the service. The law will never imply a liability under a contract against and opposed to the agreement of the parties, nor turn that into a debt which was intended to be gratuity.

We will not undertake to analyze this involved and most unsatisfactory charge, in order by construction to arrive at what we suppose to have been the meaning of the Court, or the understanding of the jury as to what the meaning was. We think that it is so contradictory, and in the matters we have indicated, erroneous, that it is due to a fair administration of the law that another trial be had, before a jury, when the law can be given to them clearly, to guide them in their investigation of the facts of the case, out of which the rights of the one party and the liabilities of the other must arise.

Reverse the judgment and remand the case..

MONTGOMERY v. EVANS, 8 Ga. 178.

(1850)

Assumpsit, etc., in Crawford Superior Court. Tried before Judge Floyd, August Term, 1849.

This was an action brought by John Evans against Montgomery, as the administrator of Reuben B. Davies, to recover one hundred and fifty-seven dollars, deposited by Elijah Evans, as alleged, with the intestate during his life, for the use of John Evans.

The plaintiff first proved by John Evans, Sr., that he was present when the money was deposited for John Evans, who was then in Mississippi. Plaintiff then offered the testimony of Elijah Evans, taken by commission, who swore that he, as the agent of John Evans, deposited the money with Davies, for Evans. * * *

Defendant then moved to dismiss the case, on the ground, that no demand was proven to have been made on the intestate or his representative. Elijah Evans, the witness, had demanded the money as his own—at least, he had sworn to it in an account, as due to himself, and ordered suit if not paid;

and said suit was brought, and then dismissed by plaintiff. The Court overruled this motion, and defendant excepted.

The Court charged the jury, that it was necessary for plaintiff to prove a demand, in order to recover; and they might look into the testimony to ascertain if this fact was proven—to which charge, defendant excepted, on the ground, that no such evidence had been before the jury.

The defendant moved for a new trial, on the several grounds of error alleged; and farther, because the verdict was contrary to the evidence. The Court overruled this motion, and defendant excepted.

And on these several exceptions, error is assigned.

By the Court.—NISBET, J., delivering the opinion.

1. The counsel for the defendant moved on the trial, that the plaintiff be non-suited, because there is no allegation in the declaration, that a demand had been made on the defendant's intestate or his representatives, after his death, of the money sued for. Whether such averment was necessary, depends upon the question, whether the defendant is liable without such demand. If he is not—if the demand is a condition precedent to his liability—I apprehend it will be conceded that the averment was indispensable. To determine this question, we must look to the character of the deposit out of which the action grew. By two of the witnesses, it is proven that Elijah Evans, as the agent of John Evans, delivered to R. B. Davies, in his lifetime, from $150 to $160, for John Evans. The testimony most favorable to the plaintiff, is that of the witness, Montgomery; and I take his evidence as determining the character of the transaction. He swears that "Elijah Evans deposited with Davies between $150 and $160 of money belonging to John Evans, and requested him to pay the same to John Evans, upon his, John Evans', return home, which Davies agreed to do." At the time of this deposit, John Evans was absent, on a visit to the State of Mississippi. This action is brought by John Evans, against the administrator of R. B. Davies, who died shortly after the deposit, for the money. The delivery of this money by John Evans, through Elijah Evans, his agent, to Davies, was, to our apprehension, a bailment, under the class deposit. A deposit is defined to be "a bailment of goods, to be kept by the bailee without reward, and

delivered according to the object or purpose of the original trust." Story on Bailment, §§ 41, 42. The delivery, in this case, if not a deposit, must belong to the class mandate; at least, if not a deposit, I do not see that it assimilates at all to any bailment, but that of mandate. If not a mandate, it must, then, be a deposit; but it is not a mandate—therefore, it is a deposit. Without the aid, however, of a syllogism, I think it is demonstrable that this is a deposit. A mandate "is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them." Story on Bailment, § 5. The difference between a deposit and a mandate, according to Sir William Jones, is, that the latter lies in feasance, and the former in custody. Jones on Bailm. 53. That is to say, the depositary is charged with keeping the goods only, and the mandatory with doing something with or about them. Mr. Story, holding that custody involves feasance, and feasance custody, excepts to Sir Wm. Jones' distinction, and says, "The true distinction between them is, that in case of a deposit, the principal object of the parties is the custody of the thing, and the service and labor are merely accessorial. In the case of a mandate, the service and labor are the principal objects of the parties, and the thing is merely accessorial." Story on Bailm. § 140. The American jurist, I think, has the advantage of the British scholar, in fulness. The object of a mandate is, that the thing bailed may be transported from point to point, or that something be done about it. The object of a deposit is, that the thing be kept, simply. Without elaborating these distinctions, it is already seen, that this is a deposit. This money delivered to Davies, was not to be carried anywhere, nor was anything to be done concerning it. By the evidence, the money was deposited with Davies, with a request to pay it to John Evans, upon his return home; which he agreed to do. It was a contract of deposit. There was a delivery, an undertaking to keep it until Evans returned home, and then to pay it to him. It would be a very unreasonable construction of the undertaking to pay it to Evans when he returned home, that it involves the obligation to carry it to him—to make a tender of it—in order to protect Davies from liability to suit. Davies had no interest in the matter; the custody of the money was assumed for Evans' benefit; and at the moment Evans did ar-

rive, the money was then in Davies' hands, as his depository. Before he returned, no one had a right to demand it. When he returned, Davies held to him the relation of depository. Suppose there had been nothing said about paying the money to Evans when he returned, but the deposit had been simply for Evans, when he returns—the obligations of Davies would then have been just what they now are. He would have been bound to pay it to him upon demand—that is just his obligation now. Mr. Davies, then, was a depository; that is his legal character; a deposit is the legal character of the transaction. What, then, under the law, are his obligations? They are two. First—it was his duty to keep the money with reasonable care. Nothing need be said about this obligation, for it is not sought to charge him for want of care. Second—it was his duty, on request, to deliver it, according to the trust. His obligation, by the terms of the trust, was to pay it, that is, deliver it, to Evans, upon his return. He was bound to deliver it on request; and upon refusal so to do, and not until then, has he violated his contract; and not until then was he liable to be sued for it. Such is the law which governs this species of bailment. If the request was preliminary—a condition precedent to liability—it was indispensable to aver it, and also indispensable to prove it. The exception to the declaration was well taken, and the plaintiff ought to have been nonsuited.

As to the necessity of request, see Story on Bailm. §§ 61, 107. Brown v. Cook, 9 Johns. R. 361. Hofmer v. Clarke, 2 Greenleaf's R. 308. 1 Dane's Abr. ch. 17, art. 1, 2. 2 Black. Com. 452. Pothier's Traite, de Depot, n. 22. As to the necessity of averring and proving a request, see Com. Dig. Pleader, c. 69. 1 Saunders R. 33, n. 2. 5 B. & Ald. 712. 1 D. & R. 361, S. C. 1 Taunt. 572.

2. The presiding Judge instructed the jury, that it was necessary to prove the request in this case. He must, therefore, have believed that it was sufficiently averred. In looking into the declaration, I find no averment, but the usual formal averment—"although often requested." Where request is a condition, as in this case, precedent to liability, that is not sufficient. The request must be so set forth, as that the Court may judge whether it is sufficient, according to the contract. Hardw.

38. Skin. 39. Saund. on Plead. and Ev. 1 vol. 131. 1 Chitty Plead. 244, '5. 1 Greenl. Ev. § 51. It must be stated, with time and place, and by and upon whom made. 3 Bulst. 298. Wallis v. Scott, 2 Stra. 88. Back v. Owen, 5 T. R. 409. Com. Dig. D. Plead. c. 69. * * *

4. The presiding Judge, as before stated, instructed the jury that a request was necessary to be proven, and that they might book into the testimony to ascertain if it was proven, and if they were satisfied that a demand was proven to have been made by Elijah Evans upon Wm. L. Johnson, the former administrator upon Davies' estate, then they would find for the plaintiff—and if not, they would find for the defendant.

Exception is taken to this charge, as being made in relation to a demand, about which there was no testimony. I have looked carefully into the evidence, and find no testimony whatever in relation to a demand by the plaintiff. This being true, it was error to instruct the jury to look into the evidence, and if they found the demand proven, to find for the plaintiff, and if not, for the defendant. It has been, over and over again, decided by this Court, that it is error to instruct the jury in reference to a matter of fact, about which there is no evilence. The language of the Judge is, that if they believed that a demand was made by Elijah Evans, they should find for the plaintiff. This was wrong, in any view of it. If he intended to be understood to instruct them, that if a demand was made by Elijah Evans, as the agent of John Evans, they should find for the plaintiff, he ought to have so expressed himself; but he does not. From what he does say, the jury could have believed nothing else, but that he meant, that a demand by Elijah Evans, in his own right, would be sufficient to authorize the plaintiff to recover. If he is to be understood as assuming that the agency of Elijah Evans, in making a demand, was proven, the charge is equally erroneous; because there is not a particle of evidence to prove that agency. The agency of Elijah Evans, in making the deposit, is proven; but so far from his agency in making a demand being proven, or there being any testimony to prove it, the reverse is true. The demand which was made, and the only demand about which there is any evidence, was made by Elijah Evans, in his own right. He presented to Davies' administrator the account, made out in his own name—swore to

it— and suit was actually brought upon it, in his name. All the evidence, in addition, as to demand, was irregularly admitted, because there was no demand averred.

Upon these grounds, let the judgment of the Court below be reversed.

COLYAR v. TAYLOR, 1 Cold. (Tenn.) 372.

(1860)

McKINNEY, J., delivered the opinion of the Court.

This was an action in the case brought by Colyar against Taylor, to subject the latter to the loss of fifteen hundred dollars, money of the plaintiffs, which came, at his request, into the possession of the defendant, in pursuance of his previous gratuitous undertaking to the plaintiff, to receive the money at Nashville, for the plaintiff, and deliver it to him at Winchester—at which place both parties resided.

Judgment was for the defendant; to reverse which, an appeal in error was prosecuted to this Court.

The error assigned, is upon the instructions of the Court to the jury.

The defendant, after receiving the money (which was in bank notes,) took it with him, in his pocket, to the public "Fair-ground," in the vicinity of Nashville, where were assembled a large crowd of persons. In the evening, the defendant applied to J. H. Estill, of Winchester, who intended returning home that night, to take charge of the money for the plaintiff; stating, that he, defendant, would not return for a day or two. Estill consented to do so, and thereupon the defendant took him aside, a few steps from the crowd of persons on the Fair-ground, and handed the money to him. Estill placed the money in his pocket book, which he deposited in the pocket of his pantaloons. Shortly afterwards, Estill got upon the train, not far distant from the Fair-ground. The cars were thronged with passengers, so much so, that Estill had to make his way through the crowd, from the second to the farther end of the fourth car, before he found a seat. Soon after taking his seat, he discovered that his pocket had been picked. The train was stopped, and he got off; and after walking back about a mile,

he found his pocket book lying in the track of the road, rifled of its contents.

His Honor, among other things, instructed the jury, in substance, that if the defendant received the money, to be carried gratuitously to the plaintiff, and, without any authority from the plaintiff to intrust the money to Estill, the defendant delivered it to him to be carried to the plaintiff, and it was afterwards lost by the negligence of Estill, that, of itself, in the absence of negligence on the part of the defendant, would not make him responsible for the loss; * * * that the defendant would not be responsible for the loss, unless he was guilty of gross negligence; * * * that if Estill "was a suitable person to confide such a trust in," the defendant could not be responsible to plaintiff for the loss of the money.

It is insisted for the plaintiff in error, that this instruction is erroneous; and such is our opinion. We are aware of no sound principle or authority, by which a bailee of any sort, may, as a general rule, take it upon himself to part with the possession of the property bailed to him, without authority to do so from the bailor. A bailment creates a trust. And though it is true, that the responsibility of a mandatory, or bailee without compensation, is, in most respects, of a lower degee than that of other bailees, still his engagement places him in the relation of a trustee, so far as to exact of him, fidelity in the execution of the trust assumed upon himself; and also to bring him within the scope of the general principle, applicable to all trustees, that the office or duties of his trust cannot be delegated by him to another, without authority. The performance of the trust is a matter of personal confidence, which it is a breach of trust in the trustee to make over to a stranger; and the original trustee will continue responsible for all the acts of the person so substituted; Hill on Trustees, (ed. of 1854,) 248, 791.

Upon this principle, it seems to us, that the unauthorized delivery of the thing bailed, by the mandatory, to a stranger, would make him responsible for the loss, on the ground of the violation of his trust.

But, again: Such a delivery of the property to a third person, is treated as a conversion. In some cases the bailor has an election, to sue on the bailee's implied contract, or to waive the contract and resort to case, or trover, according to the nature

of the injury; Edwards on Bailments, 116. Trover will not lie on the ground of negligence on the part of the bailee. This action proceeds upon the ground of his wrongful assumption of the right of property, by delivering it to a third person, without authority. This amounts to a conversion: 24 Mend., 169; 9 Johns. Rep., 361; Edwards on Bailment, 114. Accordingly, in Syed v. Hay, 4 Term Rep., 260, it is held that if a mandatory, intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, it is a conversion. And it is plain, that a delivery of the goods to a third person, without any authority to do so, is the same, in principle, as a delivery contrary to orders.

So, it is held, that even where the bailor has re-possessed himself of the thing bailed, the action may be maintained for the breach of trust, which is a conversion: 2 Esp. N. P., 190, 191; 1 Cowan's Rep. 240; Edwards on Bailment, 129. And in Stuart v. Frazier, 5 Ala. Rep., 114, it was held, that, on a deposit or bailment of money, to be kept without recompense, if the bailee, without authority, attempt to transmit the money to the bailor, at a distant point, by mail, or private conveyance, and the money is lost, he is responsible. Though, in general, this would not be the case in respect to money received for the use of another, and transmitted to him by the usual conveyance: Edwards on Bailment, 73.

These cases, and others of similar import to be found in the books, whatever may be the form of action, all proceed upon the doctrine that the engagement of the mandatory is of the nature of a trust, in the execution of which strict fidelity is required of him: Ibid. 105. Hence, as we have seen, if he parts with the possesion of the thing bailed, to a stranger, without authority, it is a violation of his trust, for which he will be liable. So, if a specific direction accompanies the bailment, it must be complied with strictly, and any substantial deviation therefrom, will, in general, render the bailee liable.

In Story on Bailments, sec. 188, it is laid down, as the rule, that a mandatory, or bailee without compensation, is responsible, only, for gross negligence, "applies solely to cases, where the mandatory is in the actual performance of some act or duty entrusted to him, in regard to the property. For, if he violates his trust by a misuser of the property, or does any other act in-

consistent with his contract, or in fraud of it, he will be clearly liable for all losses and injuries resulting therefrom."

Now, it is obvious, that the delivery of the thing bailed—especially a large sum of money—by the bailee, to a third person, without authority, is not an "act or duty entrusted to him in regard to it"; but a manifest violation of the trust, wholly inconsistent with his implied undertaking to the bailor, and in fraud of it.

And the author adds, in the same section, that "in cases of misuser, especially such misuser as amounts to evidence of a conversion, it is, perhaps, strictly true, that any subsequent loss and injury, whether it be by accident or otherwise, will be at the risk of the mandatory."

Upon the foregoing authorities, it follows, that the defendant is liable on the ground of a conversion of the money.

In the next place, we are at a loss to see how the defendant can escape liability on the ground of gross negligence.

The phrase "gross negligence," used in the books to define the degree of negligence for which a mandatory is responsible, is so vague in itself, so inapt to convey any precise idea, and so difficult of application to the circumstances of particular cases, that some confusion has been produced in the cases upon this subject, from its use; and the same remark is true, as respects the phrase, "slight diligence."

Diligence is a relative term; and what would amount to the requisite diligence at one time, in one situation, and under one set of circumstances, might not amount to it in another: 2 Kent's Com., 561.

The degree of care required of a mandatory, is essentially dependent upon the circumstances of the case. The general principle governing his liability, is, indeed, the same in all cases, but its application is materially effected, and varied by the circumstances of each particular case. The bailor's trusting the bailee with the goods, is a sufficient consideration to oblige him to a careful management; Edwards on Bailments, 94; and imposes upon him a duty to exert himself in the proportion to the exigence of the case: Ibid., 106. In Nelson v. Macintosh, 1 Starkie's N. P., 188. Ld. Ellenborough held, that though a person does not carry for hire, yet he is bound to take proper and prudent care of that which is committed to him.

The duty of a person employed without remuneration, is to act faithfully and honestly, and not to be guilty of any gross, or corrupt neglect in the discharge of that which he undertakes to do: Darnal v. Howard, 4 Bound Cres., 345.

It is not always enough that the mandatory takes the same care of the goods entrusted to him, that he does of his own, if that fall short of what is required. In Tracy v. Wood, 3 Mason's Rep., the mandatory was held liable where he had taken the same care of the bailor's money, as of his own; or more properly, where he had been guilty of equal negligence with regard to both.

The correctness of the general principle, that a mere mandatory is liable only for "gross negligence," is not to be questioned, when properly understood. Hence, if the goods be wrested from him by robbery, or taken by theft, or destroyed by fire or violence, without gross neglect on his part, he will not be liable.

But, it must be kept in view, that this general principle, that a mandatory is only liable for gross neglect, implies strict fidelity on his part, and the exercise of such care and prudence, as, with reference to the particular subject of the bailment, and the circumstances of the particular case, may be requisite for the performance of his undertaking.

Mr. Story says (Sec. 186), that the degree of care which a mandatory may be required to exert, must be materially effected by the nature and value of the goods, and their liability to loss or injury. That care and diligence, which would be sufficient as to goods of small value, or of slight temptation, might be wholly unfit for goods of great value, and very liable to loss and injury.

In the former case, the same acts might be deemed slight neglect only, which, in respect to the latter, might justly be deemed gross neglect. Perhaps, he adds, the best general test is, to consider, whether the mandatory has omitted that care, which bailees, without hire, or other mandatories of common prudence, are accustomed to take, of property of the like description. Story on Bailment, sec. 186. And in section 15, the author says: the bailee ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part.

Applying these principles to the facts of the present case, it seems to us, that the conduct of the defendant in withdrawing the money from the Bank, and taking it with him to a place, known to be generally frequented by swindlers and pickpockets, and there, in public, within a few steps of the promiscuous crowd, attempting to count the money before delivering it to Estill, evinced such a degree of heedless incaution, and disregard of common prudence, as may justly be considered as amounting to the grossest negligence. * * * Judgment reversed.[1]

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3. Rights of Bailee (Mandatary).

HARTER v. BLANCHARD, 64 Barb. (N. Y.) 617.

(1873)

Appeal by the defendant from a judgment entered upon the report of a referee.

By the Court, E. Darwin Smith, J.

This action is brought to recover for the keeping and care bestowed by the plaintiff upon the defendant's horse. From the report of the referee and the evidence adduced before him, it appears that the defendant, being a resident of Saratoga, and the owner of said horse, in the fall of 1870, entrusted the same to one William P. Tanner, residing at Frankfort, in Herkimer county, to be kept at pasture, without any charge to be made therefor. That said Tanner kept said horse on his farm, and occasionally rode him, and took him to exhibit him at the Herkimer county agricultural fair in November of that year, on which occasion he took him to the village of Herkimer, and placed him in the hotel barn of one Tower, where he remained during the day, and was left in the evening, tied with a halter, in a stall in said barn. That on the next morning the said horse was found in the stable where he had been left the previous evening, with one of his fore legs broken. That thereupon the plaintiff was sent for by said Tanner, and employed by him to take care of said horse and attempt to cure him, and it was arranged between the plaintiff and said Tanner that the said horse should be removed to the plaintiff's barn,

[1] Demand, Conversion, Statute of Limitations, 1 L. R. A. 318.
Increase of liability.—See McCauley v. Davidson, 10 Minn. 418.

and that he should take charge of him at that place, and he did so. This action is brought for work and services by the plaintiff, which the referee finds was reasonably worth $1 per day, for which sum, with some deductions for the use of said horse by the plaintiff, judgment was directed by the said referee.

From these facts, it appears that the said Tanner was the naked bailee of said horse, without reward or consideration. As such bailee he was bound to exercise slight care, and was responsible only for gross negligence. (Story on Bailm. §§ 62, 65, 66.) When the horse broke his leg, the owner—the defendant—being at a distance, the said Tanner was doubtless bound, in the exercise of ordinary care, to provide for his keeping, care and cure, as he would if the horse had been his own, and would have been guilty of gross neglect if he had omitted to make such provision.

This contract with the plaintiff was a proper and reasonable one, under the circumstances. This is not questioned. The plaintiff, as I gather from the evidence, was a farrier, and a fit and proper person, and had proper accommodations for the charge of said horse. As a bailee in possession of the horse, the said Tanner had an implied authority to contract in behalf of the defendant for such care and keeping of horse. He could no longer be pastured, and an exigency had arisen, when, to preserve his life and restore, if possible, his broken leg, such an arrangement as Tanner made with the plaintiff, became necessary; and I have no doubt he had full authority to bind the defendant by the contract then made, until at least, the defendant could be informed of the accident to his horse, and could have time and opportunity to make other provision for his custody, care and keeping. The defendant, it appears, was soon apprised of the accident to his horse, and that the same was in the possession of the plaintiff for care and keeping, and did not disaffirm such contract, or make other provision for the charge and custody of such horse.

It springs from the very relation of bailor and bailee that the latter necessarily has authority to contract for and bind the bailor in such cases, for the preservation and care of the property in his possession, and particularly with live animals injured as in this case, as much so as the master of a vessel has power to bind the owner for repairs arising from injury or casualty at

sea. Contracts so made are clearly binding upon the principal or bailee. (Story on Bailm. §§ 198, 199. 1 Pothier 167.) And this is so, even though the bailee may also be liable in such case upon a particular contract. It seems to me, quite clear that the defendant was primarily liable for the care and keeping of the horse, upon the facts found by the referee, upon the original contract; and that he should be held liable as upon an affirmation of Tanner's contract, when he learned of it, and did not disaffirm it by notice to the plaintiff directly, and distinctly reclaim his horse, or make other provision for its care; and that the plaintiff's rights in this connection are not affected by the relations between Tanner and the defendant; nor by the consideration that Tanner was guilty of such negligence in the use or abuse of the horse, as to be responsible to the defendant for the injury sustained by him. The plaintiff had nothing to do with that question.

The decision of the referee upon the whole issue, I think, was right, and the judgment should be affirmed.[1]

4. Termination.

A bailment for the sole benefit of the bailor terminates upon the death of either the bailor or bailee before performance is entered upon; and the bailor may at any time terminate the bailment upon giving notice to the bailee, whether the purpose of the bailment be legal or illegal. In like manner the bailee may terminate the same at any time upon giving reasonable notice to that effect to the bailor. 5 Cyc. 203-7.

[1] Cf. Cahill v. Hall, 161 Mass. 515.

Chase v. Cockran, 106 Mass. 286.

Chase found a boat drifting in the Mystic R. and rescued it. After two years Cockran appeared and claimed it, but Cockran refused to pay for repairs. Chase delivered boat on replevin, and brought action for repairs. Court held that he had no lien on the boat so that he could have retained the possession of it, yet having surrendered it he could recover for repairs. (No question as to expense of keeping.)

CHAPTER IV.

COMMODATES

1. CREATION.

GREEN v. HOLLINGSWORTH, 5 Dana (Ky.) 174.

(1837)

Opinion of the court, by CHIEF JUSTICE ROBERTSON:

Hollingsworth having obtained a verdict and judgment against Green, in an action of detinue, for a gold watch, several errors are assigned by Green, as arising from instructions and refusals to instruct the jury on the trial.

It appears from the bill of exceptions, that the parties being intimate acquaintances and cordial friends, and both being in a jocund mood on a public occasion, while Hollingsworth was a candidate for the Legislature, Green said to him, in the hearing and presence of several persons—"give me your watch, and I will vote for you, and do all I can to assist you in your election"; whereupon, Hollingsworth handed the watch to him, without the chain; and Green having fastened a twine string and a key to it, put it in his pocket, and they shortly afterward separated, Green still retaining the watch; about three weeks after which, Green being on a hunting excursion, with the watch in his pocket, said, on his return home, that he had lost it in the woods; and having afterward engaged others to assist in searching for it, and not finding it, he offered a reward of $10 for its discovery and restoration; but the witnesses never heard that it had ever been since seen; that some time after the alleged loss of it, Hollingsworth requested Green to return it, which he, of course, failing to do, this suit was brought for a wrongful detention of it.

The jury had to decide whether the foregoing facts conduced most strongly to establish a gift, a loan, a deposit, or a

sale, on an illegal consideration; and if there was no sale nor gift, it was the province of the jury to decide whether the bailment was a loan or a mere deposit and whether the watch had, as alleged, been lost; but it was the province of the court to decide respecting the degree of care required by law, according to the facts.

Hollingsworth could not recover unless the jury had concluded that the watch had been bailed to Green; for it is evident that if it was sold upon an illegal consideration, although the contract was void, the law would not help either party, standing, as they would, in equal fault. It is to just such a case that the maxim in pari delicto potior conditio defendentis, is conclusively applicable.

And whether, upon the hypothesis that there was a bailment, there should have been a recovery, depends on the following considerations:

First. If the bailment was a simple deposit, with implied leave to carry the watch in the pocket, and if it was lost by the bailee, he is not liable unless he was guilty of gross negligence, or unless, prior to the loss, he had violated his implied obligation to return it in a reasonable time, and thereby rendered himself responsible for all consequences; and whether, without demand, it was his duty to have returned it within three weeks after the date of the deposit, was a question of law for the court, and not the jury, to decide.

But the evidence will hardly allow the deduction that there was a mere deposit; and if it would, it would perhaps also show that it was a deposit at the instance of Green, rather than of Hollingsworth, and therefore required the observance of ordinary care, at least.

Second. If there was a simple loan, more than ordinary care was required by law. And if the watch was in fact lost, as alleged, it was the province of the court to decide as to what was gross, ordinary and slight neglect, and that of the jury to determine whether the facts established the one, or the other, or any degree of negligence.

If the watch was loaned to Green, when it was to be returned was a fact to be ascertained by the jury from the circumstances proved; and if those circumstances conduced to establish no special time, and, from the nature of the transaction as proved,

the jury could have inferred that the parties actually intended a beneficial loan, the law made it the duty of Green to return the watch in a reasonable time. But, in such a state of case, of indefinite loan for use, a court could not decide that Green was guilty of a breach of his implied obligation, in not returning the watch within three weeks, or the time that elapsed before the alleged loss of it. Nor could it be decided, as a matter of law upon the facts proved, that there was gross or even slight neglect in carrying the watch in his pocket when he was hunting. The use of it may have been, and probably was, especially important on such an occasion; and therefore, if there was culpable negligence in thus using it, the consequence might be that he could not have used it at all, without being responsible for an accidental loss of it in consequence of using it. But, there may, prima facie, have been at least slight neglect in losing the watch out of his pocket.

If the watch was loaned without any express agreement, and if Green failed, upon a demand of restitution, to return it, while he had it, or converted it, in judgment of law, by seriously claiming it as his own, he would be liable for it, whatever may have happened to it, without the agency or assent of Hollingsworth. But there is no proof of any such demand or conversion prior to the loss of the watch. And if the parties did not intend a bailment, there was no ground for serious controversy. There is scarcely a pretext for presuming a sale—it is much more probable that there was a gift. As the instructions given by the circuit judge were, in some respects, essentially variant from the foregoing principles, and may have been, to some extent, prejudicial to the plaintiff in error, the judgment must be reversed, and the cause remanded for a new trial, without any intimation as to whether the verdict could have been sustained had there been no error in the instructions.

BOOTH v. TERRELL, 16 Ga. 20.

(1854)

By the Court.—LUMPKIN, J., delivering the opinion.

This is an action of trover by Martha Booth against Richmond Terrell, for eight negroes. The plaintiff relies on the following title, namely: that her father, Richard Hodges, inter-

married with Louisa Terrell, the daughter of the defendant; and by said marriage, acquired the title to Letty, who, together with her children, constitute the property in dispute. That Mrs. Hodges died some short time after her intermarriage with plaintiff's father; and that thereupon, Richmond Hodges loaned to his mother-in-law, Mrs. Terrell, wife of the defendant, and at her special request, and by the consent and approval of the defendant, the girl Letty, to be held and enjoyed by her as a loan, during her life-time; and at her death, one of the witnesses swears, the negro was to be returned to plaintiff, who is the daughter of Richard Hodges by a former wife. The other witness testifies to the same contract, in substance, except that he states the girl was to be returned to Richard Hodges or his heirs. Richard Hodges died in 1824; and by his will, bequeathed Letty to his daughter, the plaintiff in this action.

The Court charged the Jury that the loan of a slave by one person to another, for the life of the borrower, by a parol agreement that the slave should be returned to the lender or his heirs, at the death of the borrower, vested an absolute title to the slave in the borrower.

This charge is excepted to, and the only question to be determined is, did the Court submit the Law of the case correctly, upon the facts proven?

Counsel for the defendant below and in error, insist that the charge of the Court is sustained by the decision of this court in Bryan vs. Duncan (11 Ga. R. 67.) And also by the doctrine ruled first by this Court in Kirkpatrick v. Davidson (2 Kelly's R. 301,) and repeatedly recognized since, that a remainder in slaves cannot be created by parol. * * *

2. But what was the reason given in both of these cases, for holding that in those wills the word lend meant gift? It was because "the testator evinced a clear intention to part with the entire dominion over the property bequeathed. After his death, the property never could have reverted to his executors. A final disposition of it is made by the testator." Such is the language of this Court in Bryant v. Duncan. * * *

The cause of the defendant cannot derive much aid from these precedents. First, this is not a will, but a gift, inter vivos; and secondly, so far from the lender's manifesting any intention to part with the title to this property, it is stipulated,

expressly, that it shall be returned to him or his heirs, at the death of Mrs. Terrell.

4. Is this an attempt by Richard Hodges, to create, by parol, a remainder, in personal property? What is a remainder? The remnant of an estate, limited to arise immediately on the determination of a precedent particular estate. Read the testimony of Sarah Smith and George C. Hodges, and I am quite sure that it never would occur to any legal mind that Richard Hodges, by the loan which he made of Letty to Mrs. Terrell, for life, intended to create a new estate in this negro, in himself, at the death of his mother-in-law. And this he would do, in legal contemplation, provided it were a remainder. One of the rules regulating remainders is, that they must pass out of the grantor, at the time the particular estate is created. And yet, Mr. Terrell, the defendant, declared, at the time that Hodges parted with the girl, that he had no claim on her, and that his wife only wanted her as a loan; and that he would return her at the old lady's death.

5. It has never been decided by this Court, that a reversion, in personal property, could not be created by parol; although, from the use of that word, in the first opinion delivered upon this subject (Kirkpatrick v. Davidson, p. 302), incautiously perhaps, it may be inferred that the Judge who wrote it out, supposed, at the time, that the rule applied to reversions as well as remainders. Be this as it may, we are clear that this is neither a remainder or reversion.

6. We have attempted to show that this is no remainder. Is it technically a reversion? What is a reversion? It is the return of an estate to the grantor and his heirs, after the grant is over. But here no estate, as we shall presently see, ever was granted; but a mere gratuitous permission to Mrs. Terrell to use the servant for a specified time—Hodges still continuing to be the owner of the slave, to all intents and purposes.

7. This, then, is neither more nor less than a loan—a contract of every-day occurrence, especially between fathers-in-law and sons-in-law. In this particular instance, however, owing to the peculiar circumstances of the case, the relative position of the parties to the transaction, happens to be reversed. The son-in-law is the lender, and the father-in-law or his wife, the borrower.

Chancellor Kent defines a loan to be a bailment of an article for a certain time, to be used by the borrower, without paying for the use. (2 Kent's Com. Lecture 40, p. 573, 4th Edition.) And this language is copied, almost verbatim, from Sir William Jones. See Treatise on Bailments, pp. 118, 217. Ayliffe says, "it is a grant of something, made in a gratuitous manner, for some certain use and for a certain term of time, expressed or implied, to the end that the same species should be again returned or restored again to us; and not another species of the same kind or nature, and this in as good plight as it was delivered." (Pandects, B. 4, tit. 16, p. 516.)

8. The obligation of the borrower is, to take proper care of the thing borrowed—to use it according to the intention of the lender—to restore it at the proper time, and to restore it in a proper condition. (Story on Bailments, §§ 232, 254, 255.)

9. Not only is the borrower to make a return of the thing, at the time, and in the place, and in the manner contemplated by the contract, but he must make a like return of all the increments and offspring of the thing lent. (Ib. § 257.)

10. The continuance of the loan rests upon the good pleasure and good faith of the lender, and is therefore strictly precarious. A loan being strictly gratuitous, the lender may terminate it whenever he pleases. (Story on Bail. § 277, Viner's Ab Bailment D. Bacon's Abr. Bailment D. 9 Cowen, 687. 9 East. 49. 1 Dane's Ab. Ch. 17, Art. 4, § 10. 2 Leon. R. 30, 89 Dyer, 48 b. Cro. Jac. 687. 2 Roll. R. 460. 1 Str. R. 165. Shepherd's Epitome—Countermand.)

11. The thing loaned is to be restored to the lender, unless it has been agreed that the restitution shall be to some other person. If the lender be dead, it is to be restored to his personal representative, if known. (Story on Bail. § 262.)

12. During the period of the loan, the lender still retains the sole proprietary interest, and nothing passes to the borrower but a mere right of possession and user of the thing, during the continuance of the bailment:

13. So that an action for a trespass or conversion, will lie in favor of the lender against a stranger, who has obtained a wrongful possession or has made a wrongful conversion of the thing loaned. (11 Johns. 285. 7 Cowen, 753. 9 Ib. 687. 2 Saunders, by Williams, 47, b. Bacon's Abr. Trespass C. 2. Ib.

Trover C. 1 T. R. 480. 2 Camp. 464. 8 Johns. 432. 13 Johns. 141. 2 Kent's Com. Lect. 40, p. 574, 4th Edition.)

The foregoing propositions, fully warranted as they are by adjudicated cases, demonstrate, so clearly, the nature of this transaction, to-wit: that it is neither a remainder nor a reversion, but a loan, for a definite period, with the express understanding, that at the death of Mrs. Terrell, the woman, and of course her offspring, born during the lifetime of Mrs. Terrell, should be returned to Richard Hodges, if living; or if dead, to his daughter Martha, or his heirs: I say, that this so unmistakably, is the legal character of this contract, that we are unwilling to elaborate it further.

I have said that these contracts of gratuitous loans, were subjects of daily occurrence, in the actual business of human life. This record shows that the very defence set up by Richmond Terrell, is founded upon the validity of such contracts. Whether the generous confidence bestowed by either or both of these parties, in the other, has been abused, remains to be seen.

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2. Obligations of Bailee (Commodatary)

SCRANTON v. BAXTER, 4 Sandf. (N. Y.) 5.

(1850)

Motion to set aside the report of a referee. The action was for damages to a horse alleged to have been loaned by the plaintiff to the defendant, and alleged to have been injured in the street on his way from the borrower to the plaintiff's stable.

By the Court, Duer, J. (After discussing procedure in setting aside report of referee, and deciding that the sole cause of the death of the horse was the injury which it received while in the possession of the defendant and that the contract between the parties was purely a gratuitous loan). We are therefore clearly of opinion that the defendant was liable as a borrower, and the rules of law fixing the extent of his liability are exceedingly plain, and undisputed. He was bound to extraordinary diligence, and was responsible even for the slightest neglect, de levissima culpa; he was bound to exercise all the care and diligence that the most careful persons are accustomed to apply to their own affairs, and in his case it is the omission of

the most exact and scrupulous caution, that is regarded by the law as a culpable neglect. (Coggs v. Bernard, 2 Ld. Raymond 909; Vaughan v. Menlove, 3 Bing. N. C. 468; Pothier, Peet. a Usage, n. 48, 50; Dig. Lib. 13, tit. b. 1. 18; Story on Bailments, §§ 237, 238.) He is not excused by showing that the proximate cause of the loss was the wrongful act of a third person, unless it clearly appears that the act could not have been foreseen or prevented, and that no fault or neglect of the defendant or his servant contributed in any degree to create or enhance the peril. (Story on Bail. §§ 241, 268.) Although the horse was borowed by the defendant for his own personal use, we do not doubt that he was justified in returning him by a servant, notwithstanding it seems to be clear, that had he permitted a servant to ride the horse during the day, he would have been responsible for any loss, however inevitable, that might then have happened: (Bringloe v. Morrice, 1 Mod. 210; S. C. 3 Salk. 271; Story on Bail. § 235;) but he was bound, in returning the horse, to employ an agent or servant upon whose skill, experience, and prudence he could place an entire reliance, and the servant thus employed, and for whose acts and omissions the master was responsible, was bound to the same extraordinary care as the master himself.

(Defendant sent the horse to the plaintiff in charge of a negro boy, and the court was doubtful whether the boy was a proper person for such service and doubtful whether the boy followed the safest route or exercised the necessary care to escape from the impending peril.)

Entertaining these views, it is our plain duty to set aside the report in favor of the defendant, and we think also to vacate the order for a reference; the case as it now appears being manifestly one of those that are more properly left to the determination of a jury than of a referee. The costs of this motion and of the reference must abide the event.

WOOD v. McCLURE, 7 Ind. 155.

(1855)

DAVISON, J. The complaint is that McClure, the plaintiff, on. etc., at, etc., loaned his mare to Wood, who agreed to use her carefully, and return her in good condition. Averment,

that Wood, while the mare was in his possession under said loan, abused, overworked and ill-treated her, so that she died. The proper issues being made, the cause was submitted to a jury, who found for the plaintiff. Motion for a new trial denied, and judgment on the verdict.

The evidence being closed, the Court charged as follows:

"If the jury find that said mare was loaned to Wood and was injured while in his possession by the slightest injury, from which she died, they may find for the plaintiff."

This instruction does not state the law correctly. The mere facts assumed by the Court, viz., that the mare, while in the possession of the bailee, received a slight injury, which caused her death, was not sufficient to render him liable, unless it was also shown that he had been guilty of some neglect of duty—some slight omission of diligence. A borrower, it is true, is bound to use extraordinary diligence in the care of property loaned to him, and is responsible for the slightest neglect; still, if the article loaned perish, or is lost or damaged, without any blame or neglect attributable to the borrower, the owner must sustain the loss. Scranton v. Baxter, 4 Sandf. 5.—Story on Bailments, s. 249.—Jones on Bailments, 49.

In the present case, the main question for the jury, in coming to a conclusion whether the bailee was or was not liable, was this: Was he guilty of any negligence? They were, however, under the above instruction, authorized to find a verdict against him, though innocent of any blame or neglect whatever.

But the record contains no bill of exceptions; nor does it appear that the charge was excepted to before the return of the verdict. Hence, it is insisted that the instruction, though erroneous, should not be allowed to reverse the judgment.

This position is correct. The code provides that "the party objecting to the decision of the Court, must except at the time the decision is made." 2 R. S., p. 115. In relation to this point, the rule of practice is, in effect, the same as it was anterior to the present code. Jones v. Van Patten decides that exceptions to instructions of the Court to the jury, will not be noticed in the Supreme Court, unless they appear by the record to have been taken before the jury delivered their verdict. 3 Ind. R. 107.—5 id. 542.

These cases are decisive of the one before us. The judgment must therefore be affirmed.

PER CURIAM—The judgment is affirmed, with 3 per cent. damages and costs.

BENNETT v. O'BRIEN, 37 Ill. 250.

(1865)

This is an action on the case brought by Michael O'Brien against Curtis N. Bennett at the June term, 1864, of the Circuit Court of Livingston county, for the value of a mare. The plaintiff recovered a verdict for $120, on which the court rendered judgment, and the defendant appealed. The facts appear in the opinion of the court.

MR. JUSTICE LAWRENCE delivered the opinion of the court.

O'Brien let Bennett, the appellant, have the use of his horse without compensation. This gratuitous bailment imposed on the appellant the duty of extraordinary care. After a drive in January, 1864, of eighteen miles from his home, returning the next day, the mare sickened and died. The evidence is conflicting as to the cause of her death. Two witnesses swear that the defendant admitted she had been driven into a snow bank. The jury found a verdict for O'Brien, the plaintiff below, for the value of the mare.

The appellant insists that the court erred in refusing to give his 1st, 2d, 4th, and 7th instructions. The first was as follows:

If the jury believe from the evidence that the mare in question died from inevitable casualty or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of gross negligence and carelessness.

This instruction would have misled the jury. Although the direct cause of the mare's death may have been a disease over which the defendant had no control, yet if that disease was traceable to the slightest negligence on the part of the defendant, this would render him liable.

The second instruction was as follows:

If the jury believe from the evidence that the defendant used the same care, diligence and prudence in taking care of the

mare in question that a prudent, careful man would take care of his own property under similar circumstances, they will find for defendant.

This instruction is wrong in assuming that the bailment was a bailment for hire.

When the loss of the mare is shown, the proof of negligence or want of care is thrown upon the plaintiff; it being a presumption of law that proper care and diligence were exercised on the part of the defendant.

There is some conflict of authority on this subject, but we think this instruction was properly refused in reference to a gratuitous bailee. When the death of the mare, in the hands of the defendant was proven, together with the character of the bailment, it devolved upon him to show that he had exercised the degree of care required by the nature of the bailment. These were facts peculiarly within his knowledge and power to prove, and any other rule would impose great difficulties upon bailors.

The seventh instruction was as follows:

If the jury believe from the evidence that the mare did not die from the effects of over driving and misusage on the part of the defendant, they will find for defendant.

This instruction, like the second, is objectionable because it assumes that the defendant was only bound to such care of the mare as would be a bailee for hire. Even if the mare did not die from positive over driving and misusage, yet if her disease was traceable to the slightest negligence on the part of the defendants, he would be liable. The counsel for appellant regard the bailment as a bailment for hire. We do not so consider it, but if it were doubtful upon the evidence, these instructions are wrong in assuming it to be a hiring, instead of putting the case hypothetically.

In regard to the character of the bailment, it may be remarked that the fact of the plaintiff being saved the keeping of his horse by loaning him to the defendant, although to that extent the loan may be considered an advantage to him, does not take from it the character of a gratuitous bailment. Such incidental advantage is not the compensation necessary to make the bailment one of hire. The loan of the use of domestic animals necessarily involves their keeping. He who borrows the horse of another for a week's journey, must not only incur

the expense of feeding him, but he must take the responsibilities of a gratuitous bailee. Howard v. Babcock, 21 Ill., 265. In the case before us, no compensation was paid for the use of the horse. We think the verdict sustained by the evidence.

Judgment affirmed.

KENNEDY v. ASHCRAFT, 4 Bush. (Ky.) 530.

(1868)

CHIEF JUSTICE WILLIAMS delivered the opinion of the court:

Appellant borrowed from appellee a mare to ride some three miles in the country, and instead of doing so, put the mare in a buggy, and drove her some twelve or fourteen miles, to a neighboring town, taking with him another man. The mare was unharnessed by the landlord, and ridden down to water by his son, a small boy, and then put into the stable and fed, without any attention or care by the appellant, and next morning was found dead, being much swollen, which, in the opinion of several witnesses, indicated that her disease was colic.

Upon trial, the jury found the value of the mare for appellee, and the court having refused a new trial, this appeal seeks a correction of alleged errors.

If there were no reversable errors in the instructions when applied to the evidence, the judgment must stand.

By the first instructon, the jury were directed, that if the letting was a loan, and not a hiring, "the defendant would be liable for any neglect whatever in the use and care of the animal."

In Story on Bailments (sec. 237) it is said: "As the loan is gratuitous, and exclusively for the benefit of the borrower, he is, upon the common principles of bailment already stated, bound to extraordinary diligence; and, of course, he is responsible for slight neglect in relation to the thing loaned."

Pothier says, that it is not sufficient for the borrower to exert the same ordinary care which fathers of families are accustomed to use about their own affairs; but that he ought to exert all possible care, such as the most careful persons apply to their own affairs; and that he is liable not only for slight, but for the slightest fault.

Again, Story (sec. 239) says: "What shall be deemed slight neglect or want of extraordinary diligence, must depend upon the particular circumstances of each case."

The court was therefore right in saying to the jury that the "defendant would be liable for any neglect; and if they believed the death of the mare resulted from any degree of improper usage or want of attention, they ought to find for plaintiff."

By the second instruction, the jury were directed, that if the letting was on hire, "the defendant was only bound to use and feed and attend to her, with such care as a man of ordinary prudence would bestow on his own property of the like kind under such circumstances; and if the defendant did bestow such ordinary care and diligence in the use and care of the mare, they ought to find for defendant." This instruction, though not so pertinently worded as might have been, yet evidently means, that if the defendant used and cared for the mare with as much diligence as is common with men of ordinary prudence and discretion, then the law was for defendant, and does not bring the case within the rule, as recognized by this court in Jackson v. Robinson (18 B. M. 7), wherein the lower court, in a case of bailment for the mutual benefit of both parties, instructed the jury to find for plaintiff, if the defendant was guilty of greater negligence than a prudent man would be ordinarily guilty of," which, in effect, told the jury that the defendant was responsible for such ordinary care as positively prudent men would have taken of such property under alike circumstances, instead of saying he was only liable for such ordinary care as ordinarily prudent men would have exercised under such circumstances; or, otherwise, to use the direct language of the court, "such as was usual with the common run of men," and which rule of responsibility was improperly applied to such a bailment. We regard this second instruction as tantamount to what this court recognized as the correct rule of responsibility in bailments for the mutual advantage of the parties.

The fourth instruction directed the jury, that if the defendant borrowed the mare to ride two or three miles in the country, and that he drove her in a carriage some twelve or fourteen miles, and that whilst at the town of New Haven the mare died, that "the defendant is liable for her value."

It is urged that this made the defendant liable at all events, though the death may have resulted from natural causes, and would have occurred even if used precisely as was expected, or not used at all, and perhaps may technically be liable to such objection; but when applied to the facts of this case, could not have misled the jury. Had there been evidence indicating that the death was from natural causes, which must have occurred at any rates, there would have been potency in the objection. Whilst some authors suggest such a loss resulting inevitably from causes disconnected with the improper use and bailment, or perhaps forming an exception to the general liability of a bailee in his own wrong, but which none say has ever been yet settled as a rule, it must clearly appear that such was the case, as this court, in Kelly v. White (17 B. Mon. 141), held in relation to an instruction of similar import, "the instruction then is right so far as relates to this case, and the error, if any, could not have been prejudicial." The court therein further says, whether the relation between the illegal act and the damage sustained was sufficiently proximate to create a liability on the part of the wrongdoer, and to sustain the action, "has been treated as a question of law to be decided by the court, and not as a question to be determined by the jury after determining the facts by which the relation is demonstrated."

If this be correct, we cannot say, in view of all the facts developed, that the court erred in determining that the death of the mare, and consequent damages by reason thereof, were sufficiently approximate to render the defendant liable if he was a bailee in his own wrong, as submitted in the first part of the instruction for the jury to ascertain. * * *

We have, therefore, failed to perceive any error in giving or refusing instructions as applicable to the facts of this case, hence, affirm the judgment, with damages.[1]

SMITH v. LIBRARY BOARD OF CITY OF MINNEAPOLIS, 58 Minn. 108; 59 N. W. 979.

(1894)

Appeal by defendant, the Library Board of the City of Minneapolis, from an order of the District Court of Hennepin

[1] 21 Harv. L. Rev. 409.

County, Thomas Canty, J., made December 30, 1893, denying its motion for a new trial. The plaintiff, Botilla E. Smith, owned a collection of rare coins and on April 6, 1890, delivered them in cases to defendant at its request for exhibition in its library on the corner of Tenth Street and Hennepin Avenue. Defendant agreed to and did pay the premium for fire insurance on the collection, but was to pay nothing more. About nine o'clock of the evening of September 1, 1892, there was a fire on Eleventh Street in the vicinity of the library building and it attracted the attention of those having charge of the property in the library. At about ten o'clock that night it was discovered that one of the cases containing coins had been taken from the frame and had disappeared. It contained two hundred and eighty American silver coins, some of them rare and of early date. The property was undoubtedly stolen and was never recovered. This action was to recover the value. Plaintiff had a verdict for $677.45. * * *

COLLINS, J. The defendant board was chartered for the purpose of establishing and maintaining public libraries and museums. While it was not expressly authorized to take property as a loan or deposit, or to incur the liability of an ordinary bailee, such express authority was not necessary. In addition to the powers expressly granted, it had those which are necessarily or fairly implied in or incident to the powers expressly granted, and those also essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. That it could take personal property in some other way than by gift, grant, purchase, devise, or bequest is evident from the words "or other wise," which are added to those mentioned. It was also expressly empowered to undertake and perform every act necessary or proper to carry out the spirit and intent of the incorporating act. Coins of all descriptions are regarded as essential and indispensable to the establishment and maintenance of museums, and it is a well-known fact that in nearly every institution of this kind there are large and valuable collections owned by private individuals, and held by the exhibitors as loans or deposits. Frequently the most valuable works of art and the rarest collections of curios can only be obtained in this way. We have no doubt of the power of the board to take property of this character by express or implied contract,

and to incur liability thereunder. In doing this, it is undoubtedly acting within the scope of its powers, and carrying out the spirit and intent of the statute creating it.

2. It is admitted that defendant board desired that plaintiff place the coins in its custody for exhibition, and that the plaintiff was also desirous, for reasons of her own, that they be exhibited to the public and that the latter be informed as to the ownership. With this mutually understood, they were handed over and put upon exhibition, defendant having entire control of them for the time being. At defendant's request, plaintiff loaned her property to it, and the law required of the former that it exercise ordinary care and prudence in caring for the same. If ordinary care and prudence were not exercised by the board in regard to the property, and it was stolen, then defendant board would be liable in damages, and the trial court so charged. But it was contended that some time after the coins came into defendant's possession, without any express understanding as to the latter's liability, a resolution was passed by the board, of which plaintiff was notified, that it would not be responsible for the safety of the coins, or for them, in any manner, except as to loss by fire. It did procure and pay for a fire insurance policy at this time. On the trial, plaintiff denied that she was informed of the resolution, and in view of the conflict in testimony the jury were instructed that, if they were of the opinion that plaintiff had knowledge of this resolution, she could not recover, unless they found that the coins were stolen and lost by reason of the gross negligence of the defendant. Of this feature of the charge the latter should not and does not complain. Evidently, under the charge of the court, as applied to the admitted fact, any error with respect to the admission of the receipt in evidence, and also as to what the librarian said to plaintiff and her husband relative to the responsibility of defendant board, worked no prejudice to it. The result was not affected by either the receipt or the statements.

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3. Rights of Bailee (Commodatary)

BRINGLOE v. MORRICE, 1 Mod. 210; 3 Salk. 271. (1676)

Trespass for immoderately riding the plaintiff's mare. The defendant pleaded that the plaintiff lent to him the said mare,

et licentiam dedit eidem equitare upon the said mare; and that by virtue of this license the defendant and his servant alternatim had rid upon the mare. The plaintiff demurs.

THE COURT. The license is annexed to the person, and cannot be communicated to another: for this riding is a matter of pleasure.—North, Chief Justice, took a difference, where a certain time is limited for the loan of a horse, and where not, In the first case, the party to whom the horse is lent, hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was taken betwixt hiring a horse to go to York, and borrowing a horse: in the first place the party may set his servant up; in the second not.[1]

CHAMBERLAIN v. WEST, 37 Minn. 54; 33 N. W. 114.

(1887)

Appeal by defendant from an order of the district court for Hennepin county, Lochren, J., presiding, refusing a new trial.

MITCHELL, J. This action was brought to recover the value of a diamond scarf-pin, alleged to have been stolen from plaintiff's room while a guest at the West Hotel. It appeared from the evidence that the plaintiff was not the general owner of the pin, but that a year or two previous he had borrowed it from a friend, who, he says, "loaned it to him for ten years." The plaintiff had a verdict for the full value of the property. The defendant's contention is—First, that plaintiff, being a mere gratuitous bailee, had no such interest in the property as would entitle him to recover; and, second, even if he could maintain an action, he could only recover the value of his special property in the thing.

Nothing is better settled than that, in actions for torts in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee, or other special-property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own in-

[1] The objection was, that the defendant pleaded license for the taking, but gave no answer to the immoderate riding; and the court adjudged the plea good; the taking being the gist, and the riding only aggravation of the trespass. S. C. 3 Salk. 271.

terest; but as against the general owner or one in privity with him he can only recover the value of his special property. 1 Sedg. Dam. note a; 1 Suth. Dam. 210; Jellett v. St. Paul, M. & M. Ry. Co., 30 Minn. 265, (15 N. W. Rep. 237;) Russell v. Butterfield, 21 Wend. 300; Mechanics', etc., Bank v. National Bank, 60 N. Y. 40; Atkins v. Moore, 82 Ill. 240; Fallon v. Manning, 35 Mo. 271. A mere depositary or gratuitous bailee may maintain such an action. The bailee may maintain it, although not responsible to the general owner for the loss. This he may do, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost; as, for example, a common carrier or innkeeper. Edw. Bailm. § 37; Faulkner v. Brown, 13 Wend. 63; Moran v. Portland Steam Packet Co., 35 Me. 55; Finn v. Western R. Co., 112 Mass. 524; Kellogg v. Sweeney, 1 Lans. 397; 46 N. Y. 291.

2. Whether this pin was stolen from plaintiff's room, and whether he himself was guilty of contributory negligence, were, under the evidence, questions of fact for the jury. There is evidence reasonably tending to support the verdict, and hence this court cannot disturb it.

3. The defendant sought to relieve himself from his common-law liability as innkeeper by showing compliance with Gen. St. 1878, c. 124, §§ 21, 22, (Laws 1874, c. 52.) This statute requires the innkeeper, in order to bring himself within its provisions, to keep in his hotel an iron safe, suitable for the custody of money, jewelry, or other valuables, and to keep posted conspicuously at the office, also on the inside of every entrance door of every public sleeping, reading, bar, sitting, and parlor room of the hotel, a notice to the guests that they must leave their money, jewelry, and other valuables with the landlord for safe-keeping. It is incumbent on an innkeeper claiming the benefit of this statute affirmatively to show a substantial compliance with all its requirements. Much of the evidence on this point was so vague and indefinite, and mere impressions not within the personal knowledge of the witnesses, that it cannot be said that the posting of any such notices in the manner required was conclusively or even satisfactorily proved anywhere except in the sleeping-room occupied by plaintiff. No actual notice was brought home to plaintiff. Under these circumstances, defend-

ant cannot complain that the court left it to the jury to determine from the evidence whether he had posted notices as required by the statute.

Order affirmed.[1]

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4. TERMINATION.

SMILEY v. ALLEN, 13 Allen (Mass.) 465.

(1866)

Replevin of a gold watch and chain and sundry articles of jewelry. The writ was dated November 10th, 1864.

At the trial in the superior court, before Ames, J., it appeared that Francis Frye, in October, 1864, was struck by the engine attached to a railroad train in West Roxbury, and was killed. The defendant, as a coroner of the county, caused an inquest to be duly held, and thereafter took charge of the articles described in the writ, all of which were found upon the person of the deceased. The plaintiff, who at first represented herself to be the wife of said Frye, claimed the property as her own, and demanded it of the defendant, before bringing this action. The defendant did not comply with the demand, but insisted that it was his duty to deliver it to the administrator of the estate of said Frye, when appointed; and it appeared that one Shepherd was ap-

[1] Use.—"The right of the bailee to use the thing bailed is strictly confined to such use, expressed or implied, as was anticipated by the bailor at the time of the bailment and the former is responsible for any loss arising from an unauthorized use, although the loss be caused by some inevitable casualty. So the bailee has no right to delegate his power of user, unless there be some understanding or agreement to that effect."

Defects in object of bailment.—"Where the bailment is for the sole benefit of the bailee, the bailor, when aware of any defect in the property which would make its use to the bailee dangerous or not beneficial, must inform him thereof; and should he conceal such defect will be responsible for any injury arising therefrom. Where, however, the defect is not known to the bailor he is not liable in case of injury, even if he ought to have known of it. Neither is he responsible for injury done to another by the bailee's negligence in his use of what is bailed." 5 Cyc. 179-180.

Expenses.—Ordinary expenses incident to the use of the thing borrowed must be borne by the borrower. "But if, on the other hand, there should be extraordinary expenses,—expenses that are not occasioned or necessary by reason of the natural or ordinary use of the property, for such extraordinary expenses the bailor would be liable, and not the bailee." Van Zile on Bail. & Car. § 110. Story on Bailments, § 256.

pointed such administrator on the 7th of November, 1864, and claimed and still claims that the property belongs to him in that capacity. It was not claimed that the articles came wrongfully to the hands of said Frye, but the plaintiff insisted that she delivered them to him, and permitted him to use and wear them as a favor and an act of friendship and kindness to him, without any stipulation as to the length of time that such use should continue, as a gratuitous bailment. And it appeared that he had usually worn said articles and carried them on his person for four or five years, and to the day of his death. * * *

The jury thereupon, by direction of the judge, returned a verdict for the defendant. The plaintiff alleged exceptions.

BIGELOW, C. J. Upon the undisputed facts of this case, the right of property in the articles replevied was at the time of suit brought in the plaintiff. We think it also clear that the right of possession was then in her, and that this action can be maintained.

The person deceased, on whose body they were found by the defendant, was a mere gratuitous bailee. The articles were lent to him by the plaintiff, subject to be reclaimed by her at any moment. His death did not in any way affect or change her right of property, or of immediate possession on due demand. It did make it the duty of the defendant to take charge of the property in his capacity as coroner. This is imposed on him by Gen. Sts. c. 175, § 17; but the same statute also makes it his duty to "deliver the same forthwith to those entitled to its care or possession." The administrator of the person deceased had no right or title in them, nor could he lawfully claim to retain possession of them as against the plaintiff. There was no lien on them in favor of the intestate's estate. The bailment was at an end, and the right of the plaintiff to resume possession was absolute. We know of no principle or rule of law by virtue of which an administrator can claim a right as against the owner to receive or take possession of property belonging to another person which was in the hands of his intestate at the time of his death, and which the latter would have been bound to deliver to the former at any moment on demand. Nor does the statute above cited, which imposes on a coroner the duty of taking charge of property of persons deceased, confer any such right. On the contrary, it is studiously framed so as to avoid any interference with the

legal rights of parties. The possession which the coroner is authorized to take is for the immediate care and preservation of the property only, in order that it may be forthwith delivered to those entitled to its care or possession.

But it is suggested that a coroner is a judicial officer, and that no action can be maintained against him for the exercise of any authority coming within the scope of his legitimate jurisdiction. This is a well settled rule; but it has no application to the present case. A coroner is clothed with certain judicial powers; but he is also authorized to exercise ministerial and executive duties. For error, mistake, or even misconduct in the former capacity, he is not liable to an action; but when he acts in the latter capacity, he is answerable to those who are injured by any excess or abuse of his official powers. In this respect, he stands on the same footing with sheriffs and justices of the peace. We are unable to see that the duty imposed on him by the statute, of taking possession of property found on the body of a deceased person and of delivering it forthwith to the person entitled to it, has in it any of the elements of a judicial power or authority. It is the mere performance of a prescribed act. It involves no exercise of judgment or discretion, by which the rights of any person are conclusively settled. His action is in its nature purely ministerial, like the service of a writ or the levy of an execution. An officer is required to seize the goods of the debtor; he must determine what goods he will take; if he errs and takes the property of another person he is liable therefor. So here; the coroner is bound to take charge of the property, and to deliver it to the person entitled to receive it. If he refuses unreasonably or without sufficient cause, he violates his duty and is liable therefor.

But it is said that this interpretation of the statute casts an unreasonable burden on a public officer, by requiring him to determine at his peril in whom the right of possession of the property is vested which the law requires him to take in charge. We think this argument is pressed too far by the counsel for the defendant. A coroner cannot be held liable for property taken in charge by him, until after due demand and a wrongful refusal to surrender it, equivalent to a conversion. It is rightfully in his possession until due demand is made therefor, and he wrongfully refuses to give it up. He would not be liable on proof of a mere demand. If A. find the goods of B., and on demand answers that he knows

not whether B. be the true owner, and therefore refuses to deliver them, this is not evidence of a conversion. Isaack v. Clark, 2 Bulst. 312. Gunton v. Nurse, 2 Brod. & Bing. 447. Clark v. Chamberlain, 2 M. & W. 78. Solomons v. Dawes, 1 Esp. 83. Davies v. Vernon, 6 Q. B. 443. If, in the present case, the defendant had, on the demand of the plaintiff for the articles in question, required reasonable proof of her title to the possession of them, his refusal to deliver them without such proof would not have rendered him liable to an action.

But the evidence in this case discloses that on demand made he denied absolutely the right of the plaintiff to the possession of the articles. He set up against her claim the right of the administrator to receive them. This was a conversion. A refusal to surrender property belonging to a party, on the ground that it belongs to another person, proves a conversion. Caunce v. Spanton, 7 Man. & Gr. 903. 2 Saund. 47 f. Exceptions sustained.

CHAPTER V.

PLEDGES

1. Creation.

WIGMORE: PLEDGE-IDEA, 10 Harv. L. Rev. 321-5.

The pledge-idea—briefly expressed, that of collateral security—is familiar enough in modern law. But it is distinctly an idea of modern times. The various known systems of law recognize it with various degrees of definiteness, according to the social stage which their development has reached, or had reached when arrested. The idea familiar to us has grown, in the history of the law, out of a very different one. * * *

To realize the root notion of the transaction, we may put ourselves in the place of the primitive traders and try to reconstruct the conditions of their traffic. In the ordinary case of barter between passing travelers, or at the monthly or half-yearly markets, A will find what he wants in B's hands, but the equivalent which A has to give may be either not to B's liking in kind or not of proper value. They must and will make a provisional trade or payment, B taking something of A's that will induce him to sell, but A having the privilege of substituting later an equivalent not now available. So, too, when A has injured B, and B seeks self-redress by his own hands, A may be able to buy off B by handing over whatever he has that is available but subject to the right of subsequent substitution of something more nearly an equivalent. In short, all transactions of the sort must be cash transactions, because there is no credit. * * * The cardinal feature of the transaction is, then, that the party whom we shall call the creditor goes away with nothing left to claim, though the (as we call him) debtor has a right of redemption against the other.

We shall be better able to appreciate the primitive state of mind if we remember that in at least four important bodies of law and

language the primitive word for the ideas of "pledge," "bet" (or "forfeit"), and "promise" was substantially the same. In the Scandinavian we have vaed, ved. In the German we have wetti, wette, wedde, vadi-um, guadi-um, and (by sliding the di into ji) wage, gauge, gage. In the Latin we have pignus in the first two meanings, and from the same root (πηγνυμι) pango, pag, pactum, in the third meaning. In the Greek the verb stem θετ- (put) has all three meanings. It is not merely that the words for the three ideas were the same; it is much more than that; there was only one idea for what we now distinguish as three. That is, the transactions which we now distinguish as pledge, forfeit, and promise, were then not distinguished at all, and only differentiated themselves later and gradually. We may get some slight notion of the unity by noticing how to-day we ourselves say, "I pledge you my word," and "He pledged his watch" (thus using one word for the first and third notions); or, "I stake my honor upon it," and "He held the stakes" (thus using one word for the second and third notions); or how the Germans say "pfand" for the first notion, and "Pfandspiel" for a game of forfeits. But of course with us the ideas are still different, though the words may coincide; while with the primitive speaker the one root represented the same general notion. We can, however, describe the past only in terms of our own notions; and, in fixing on the idea which most nearly represents to us the essence of the primitive notion, we find the second one to be the chief and suggestive one, i.e. "bet," or, more closely, "forfeit." The "forfeit" idea is the important one, because, first, out of it the other two seem to have developed, and, next, it brings out most clearly the contrast between the original and the modern idea of the transaction which we now call "pledge." The "promise" idea developed by transferring the moral emphasis from the fact that the transaction was settled to the fact that it was only provisionally settled; the "forfeit" itself was used as a mere form, and was subordinated in idea to that which it came to mark, i. e. the debtor's duty.

On the other side, the "pledge" or "collateral security" idea developed by a similar transfer of emphasis where the res handed over remained of substantial value; i. e., the idea that it was provisional led to the disappearance of the "forfeit" idea; the original claim became ultimately the measure of the parties' rights, and therefore the debtor could no longer throw the creditor exclusive-

ly on the res for satisfaction, nor could the creditor keep it all in case of default. It is this progress from the idea of forfeit to the idea of collateral security which we are to keep in mind as the general feature of our present subject. * * *

It would seem, then, that there are evidences in nearly a dozen different systems (Germanic, Scandinavian, Jewish, Mohammedan, Egyptian, Chaldean, Slavic, Hindu, Japanese, Greek, Roman, and French) of law that the progress has been from a primitive forfeit-idea to a later collateral-security idea.

WILSON v. LITTLE ET AL., 2 N. Y. 443.

(1849)

Appeal from the superior court of the city of New York where James Wilson brought an action on the case against Jacob Little and others for wrongfully selling fifty shares of stock in the New York and Erie Railroad Company. On a case being made, the superior court deducted from the verdict the amount of the debt to secure which the stock in question had been pledged to the defendants, and gave judgment in the plaintiff's favor for $2609.05, damages and costs of suit. The case having been turned into a bill of exceptions, the defendants appealed to this court.

RUGGLES, J., delivered the opinion of the court. This was an action for wrongfully selling fifty shares of Erie railroad stock, which the defendants, Little & Co. had received in security for a loan of $2,000 made by them to Wilson, through the agency of R. L. Cutting, a broker. The contract in writing was in these words:

"New York, Dec. 20, 1845.

$2,000. I promise to pay Jacob Little or order two thousand dollars, for value received, with interest at the rate of seven per cent. per annum, having deposited with them as collateral security, with authority to sell the same at the broker's board, or at public auction, or at private sale, at option, on the non-performance of this promise, without notice on fifty Erie.

R. L. Cutting."

The stock in fact belonged to the plaintiff Wilson, but stood in Cutting's name on the books of the New York and Erie Railroad

Company. It was of that kind known as consolidated capital stock. Cutting negotiated the loan as the plaintiff's broker. On the same day Cutting made a transfer of the stock on the books of the company in the words following:

"N. Y. & Erie Co.

For value received, I hereby transfer unto Jacob Little & Co., all my right, title and interest in fifty shares of the consolidated capital stock of the New York & Erie Railroad Company. New York, Dec. 20th, 1845. R. L. Cutting."

It is contended, on the part of the defendants, that the transaction was a mortgage and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellants, and was only redeemable in equity. If this be true, the supreme court and the court for the correction of errors must have rendered their judgments in the case of Allen v. Dykers, (3 Hill, 593, and 7 id. 498,) upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same on the non-performance of the promise, 250 shares of a stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage and not a pledge, the plaintiff must have failed. The sale of the stock in that case, by the lender, before the maturity of the note, did not make it the less decisive. (See Brown v. Bement, 8 John. 98.) If there had been good ground for saying, in Allen v. Dykers, that the stock was mortgaged and not pledged, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied that if the point had been taken it would have been overruled.

The argument of the defendant in this case is founded on the assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remains in the pledgor: and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, &c., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery, or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge. (Story on Bail. §§ 290, 297.) The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws. (1 R. S. 600, § 1.) It is so in the case of the New York and Erie Railroad Company. (Laws of 1832, ch. 224, § 18.) The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of the goods. Indeed, it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor

has exercised the power of sale. Reeves v. Cappen (5 Bing. N. C. 142,) was a case in which the debtor "made over" to the creditor "as his property" a chronometer, until a debt of £50 should be repaid. It was held to be a valid pledge.

In the present case the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character is qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of $2,000, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper.

The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the thing pledged on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock.

In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment: but selling without notice is not a demand of payment, and it is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due, immediately. (Story on Bail. § 308; Stearns v. Marsh, 4 Denio, 227.)

Payment of the note in this case was not demanded until the 3d of January, 1846. Previous to that time, and about the 24th of December, 1845, the defendants had sold the whole or the greater part of the fifty shares of consolidated stock pledged to them by the plaintiff, and were therefore not in condition to ful-

fill the contract on their part by restoring the pledge. Nor were they able nor did they offer to restore the same kind of stock, or stock of the same value as that which had been pledged in behalf of the plaintiff. On the 3d of January, when the defendants offered to deliver the converted stock, which was of a different kind and value, the plaintiff's broker was willing to receive any stock of the same description as that which had been pledged; but no stock of that kind was offered by the defendants. There was at that time a material difference in the market price between the consolidated and the converted stock of the company, the former selling at $85, and the latter at $55 per share. The pledge of the 50 shares of consolidated stock, therefore, could not be restored or made good to the plaintiff by assigning to him the same number of shares of converted stock. The defendants were bound to restore the identical stock pledged. The sale of it by the defendants before payment demanded was therefore wrongful, and the evidence sustains the third count in the plaintiff's declaration. The defendants having voluntarily put it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was therefore unnecessary. (3 Hill, 596; 7 id. 498.)

Judgment affirmed.

NEWTON ET AL. v. FAY, 10 Allen (Mass.) 505.

(1865)

CHAPMAN, J. This is a bill in equity to redeem certain shares of stock of the Otis Manufacturing Company and of the Springfield Fire and Marine Insurance Company, which the bill alleges were transferred by Jacob B. Merrick, the plaintiff's intestate, to the defendant, as collateral security for a note made by Merrick to the defendant. The answer admits that the defendant holds the stock of the Otis company as alleged in the bill, and there is no controversy in respect to that stock; but it denies that the stock of the insurance company was transferred to him as collateral security, and says that the conveyance of it to him by Merrick was intended to be an absolute sale or gift. On an issue framed to try this question before a jury, it appeared that the transfer of the stock was in the usual form of an absolute transfer, and the plaintiffs were permitted to prove by oral evidence that it

was intended to be a security for the note, and was founded on no other consideration. The question now presented is, whether this evidence was admissible.

It is not contended by the defendant's counsel that the provision of Gen. Sts. c. 68, § 13, affects the question. That provision is, that "in transfers of stock as collateral security, the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer. A certificate of stock issued to a pledgee or holder of such collateral security shall express on the face of it that the same is so holden; and the name of the pledger shall be stated therein, who alone shall be responsible as a stockholder." The obvious purpose of this section is to enable the pledgee to hold the security without being liable for the debts of the corporation or to taxation for the property; and if it were to be construed as excluding all other methods of conveying stock as collateral security, it would exclude evidence of a separate defeasance in writing. It was not framed with a view to that question, but altogether alio intuitu. It is to be noticed that it speaks of such a transfer of stock as a pledge, though the general property in the stock apparently passes to the vendee. The ordinary distinction between a mortgage and a pledge is, that by the former the general property passes, while by the latter it does not, but merely a special property passes. It is held in New York that a transfer of stock as collateral security is to be regarded as a pledge rather than a mortgage. The reason assigned is, that in order to constitute a pledge the possession must pass, and possession of stock cannot be transferred except by a transfer of the stock itself. A delivery of the script or certificate does not transfer the stock. The owner usually writes on his certificate a transfer very much like a bill of parcels, or a power of attorney to some one to make the transfer, and the papers which complete the possession in the vendee are made by the officers of the corporation. On account of this peculiar character of the property, it was formerly doubted whether it could be the subject of a pledge. But it is now held that it can be, and it is considered to be more in accordance with the intention of the parties to treat it as a pledge than as a mortgage. Wilson v. Little, 2 Comst. 443. Allen v. Dykers, 3 Hill, 593. Dykers v. Allen, 7 Hill, 497. Vaupell v. Woodward, 2 Sandf. Ch. 143. The same doctrine seems to be recognized in Pennsylvania. Gilpin

v. Howell, 5 Penn. State R. 41. In New York it is also applied to the transfer and delivery of commercial paper. White v. Platt, 5 Denio, 269.

If regarded as a pledge, it is more in the nature of a trust than if regarded as a mortgage. The principal reason assigned for not regarding a mortgage as strictly a trust is, that the mortgagee has a property in the thing which he may make absolute in case the condition is not performed, by foreclosing the right of redemption. But the pledgee cannot do this. If the debt or duty is not discharged, he must avail himself of the security by selling the thing pledged, and not by foreclosure; and he holds the avails of the sale in trust to discharge the debt or duty, and, if any balance remains, to pay it to the pledger. Gen. Sts. c. 151, §§ 9, 10.

The practice of taking transfers of stock as collateral security is very general among all classes of business men and moneyed corporations; and in a large proportion of cases the transfer is absolute, and the purpose and consideration of the transfer are evidence by mere oral agreement. The question raised in this case is, therefore, of great practical importance.

The rule relied on by the defendant, that parol evidence is inadmissible to prove that a sale or conveyance in writing which is absolute in its terms was not intended to be absolute, but was given as a pledge or mortgage, is well established in respect to actions at law, and this court have so held in Harper v. Ross, ante, 332. It does not, however, apply to a bill of parcels. Hazard v. Loring, 10 Cush. 267. Jewett v. Warren, 12 Mass. 300. Hildreth v. O'Brien, ante, 104.

But this is a suit in equity, and it is therefore important to inquire what is the rule which courts of equity have applied to this subject. If a pledge or mortgage of property were to be regarded merely as a trust, the evidence would be admissible; for it is well settled that, since the statute of frauds as well as before, a trust of personal chattels may not only be created but if necessary established and proved by mere parol declaration. Hill on Trustees, 57, and cases there cited. Some of the cases are very strong. In Kingsman v. Kingsman, 2 Vern. 559, the defendant held property by an absolute legacy, and a trust was decreed on the strength of his admissions made in the presence of several witnesses. Nab v. Nab, 10 Mod. 404, is another strong case of the same character. But a mortgage is not regarded as strictly a

trust, and no case has been found where the question has been discussed in respect to a mortgage or a pledge of a chattel. The cases which have come under discussion have been formal conveyances of real estate, and it seems to be well settled as a principle of equity jurisprudence in the courts of equity in England, in the United States courts, and in some of our state courts, that oral evidence is admissible in a suit in equity to prove that a conveyance of real estate, absolute in its terms, was intended as a security for a debt, or an indemnity against a liability, and that upon such evidence a decree of redemption will be made.

The policy of courts of equity has been from the earlier times to protect debtors, whom they regard as the weaker party, against being wronged or oppressed by creditors, whom they regard as the stronger party. Their method of interference has been by preventing the creditor from maintaining his title according to the legal effect of his conveyance whenever it was inequitable for him to do so. Therefore it was held in Howard v. Harris, 1 Vern. 190, that if a mortgage is made by its terms irredeemable, or the redemption is restricted such restrictions are disregarded. In Spurgeon v. Collier, 1 Eden R. 55, the same doctrine was held, and Lord Northington said that a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. In Vernon v. Bethell, 2 Eden R. 110, parol evidence was admitted to prove that an absolute conveyance of an equity of redemption of real estate was made as security for a loan and for no other consideration, and the vendor was permitted to redeem. The court said that necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them. When such parol evidence has been admitted, it has not been regarded as inconsistent with the statute of frauds. In Walker v. Walker, 2 Atk. 98, Lord Hardwicke said it had nothing to do with the statute of frauds. In Kunkle v. Wolfersberger, 6 Watts, 126, Gibson, C. J. said, the proof raises an equity consistent with the writing. It seems to be regarded as an inquiry into the consideration of the sale, for the purpose of doing equity between the parties. The rule on this subject and the reason of it are fully and clearly stated by Mr. Justice Curtis, in Russell v. Southard, 12 How. 139. He says: "To insist on what was really a mortgage as a sale is in equity a fraud which cannot be success-

fully practised under the shelter of any written papers, however precise and complete they may appear to be." He cites several English as well as American authorities to sustain this position. In the prior case of Morris v. Nixon, 1 How. 126, the same doctrine had been before held, and in Babcock v. Wyman, 2 Curtis C. C. 386; S. C. 19 How. 289; it was reaffirmed. The case of Russell v. Southard came up from Kentucky, and Mr. Justice Curtis says: "It is suggested that a different rule is held by the highest court in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles." But he cites the case of Edrington v. Harper, 3 J. J. Marsh, 355, where it was held that the fact that the real transaction between the parties was a borrowing and lending will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money, and whenever it can be ascertained to be a security for money, it is only a mortgage. Mr. Justice Story had held the same doctrine at a still earlier period. He held that parol evidence was admissible to show that an absolute deed was intended as a security for money, and that such a deed should be treated as a mortgage, whether the defeasance was omitted by fraud, mistake or accident, or by design, upon mutual confidence between the parties; for he says the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience and justice. Taylor v. Luther, 2 Sumner, 228. Jenkins v. Eldredge, 3 Story R. 293. The same rule has long been held in New York and on the same ground. Strong v. Stewart, 4 Johns, Ch. 167, was decided by Chancellor Kent on the strength of several English authorities cited by him. See also Slee v. Manhattan Co., 1 Paige, 48; Van Buren v. Olmstead, 5 Paige, 9. In the latter case the rule is said to be well settled. After considerable discussion it was settled that the rule was limited to cases in equity, and did not prevail in courts of law. Webb v. Rice, 1 Hill, 606. Hodges v. Tennessee Ins. Co., 4 Selden, 416. But by the code parol evidence is made admissible both at law and in equity to show that an assignment, though absolute in its terms, was a security for a loan or an in-

demnity against a liability, and is therefore a mortgage. Despard v. Walbridge, 15 N. Y. 374. In Wright v. Bates, 13 Verm. 341, the court say: "It is well settled law in this state that a court of chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor continues to remain in possession, though the defeasance rests wholly in parol." But where possession has followed the deed through several grantees, such evidence is held inadmissible. Conner v. Chase, 15 Verm. 764. And in this last case Williams, C. J., argues against the rule itself. In a note to 2 Cruise Dig. (Greenl. ed.) tit. xv. c. 1, § 20, it is said that "in Maine and Massachusetts the statutes recognize only two modes of creating a mortgage to which the chancery jurisdiction of the courts extends, namely, by proviso inserted in the deed, and by a separate deed of defeasance. All equitable mortgages created by contract of the parties seem therefore to be excluded. Relief, if any, in other cases must be referred to the head of fraud, trust, or accident and mistake." Since the publication of that work relief has been afforded under this head in a case where an absolute deed was alleged to have been intended as a security for a debt, and where the answer and proof showed the intention. Howe v. Russell, 36 Maine, 115. No case has arisen in this commonwealth where this court could consider whether it would adopt the rule of equity admitting parol evidence to prove that an absolute deed was given as security for a loan or for indemnity. For though the court has had jurisdiction of trusts for many years, yet the jurisdiction has been strictly construed, and has been held not to extend to trusts created by converting a fraud into a trust. Mitchell v. Green, 10 Met. 101. As a mortgage is not strictly a trust, but the element of fraud is held to enter into the attempt to convert it into an absolute sale, the court could not, prior to 1855, have entertained jurisdiction of such a case. The present case does not require us to decide whether the rule ought to be adopted here in application to a mortgage of real estate.

But in respect to the transfer of stocks, which requires but little formality between the parties, and is often made in the hurry of business, as a bill of parcels is made, and as to which a trust may be created and proved by parol, and which is to be regarded as a pledge rather than a mortgage, when used as a collateral

security, we think the principle of equity jurisdiction so fully established elsewhere in regard to instruments much more formally executed ought to be adopted, admitting oral proof as to the consideration and purpose of the transfer, and that, upon the discharge of the debt or duty secured by it, the pledger should be permitted to redeem.

Decree for the plaintiffs.

BREWSTER ET AL. v. HARTLEY ET AL., 37 Cal. 15.

(1869)

An election was held February 4th, 1868, at Placerville, in said county, being the time and place appointed by the by-laws for the election of Directors, at which, of the whole number of votes cast, each of the defendants, namely: H. H. Hartley, Geo. W. Swan, John Blair, James Blair, Truman Wilcox, F. A. Bishop, G. G. Clark, Wm. C. Wilkinson, and S. D. Brewster received ten thousand five hundred and twelve, ten thousand of which were cast by Louis McLane, by his proxy, Charles E. McLane. And three thousand and ninety-eight votes were cast for each of the plaintiffs, namely: C. W. Brewster, W. S. Burns, F. A. Bee, A. T. Melvin, L. Landecker, R. B. McBride, J. G. McCallum, W. H. Cooper, and O. H. Burnham.

All of the votes cast were admitted to be legal and correct votes, except the ten thousand votes so cast by said Louis McLane, which are claimed to be illegal by plaintiffs, but which is denied by defendants.

At the time and before said ten thousand votes were cast, the right to cast them was denied and objected to, and a protest was made against their being cast by all the stockholders who voted for the plaintiffs.

The Chairman of said meeting having overruled said objection, an appeal was thereupon taken to said stockholders' meeting, who voted three thousand and ninety-eight shares against sustaining the same, and ten thousand five hundred and twelve shares to sustain it—ten thousand shares thereof being cast in manner aforesaid, against the objection and protest of all those voting against sustaining said decision—and the same was thereupon declared to be sustained, and said ten thousand shares were voted accordingly.

Said defendants were thereupon declared to be elected, against which declaration the plaintiffs then and there protested. Defendants are now, and have since said election, been acting as such Directors, and in the possession of said offices, together with the books and property appertaining thereto. Plaintiffs, before the commencement of this action and proceeding, and after said election, demanded the possession of said offices, books, and other property appertaining to said offices, which defendants refused to deliver. The whole number of shares of the capital stock was fifteen thousand, at one hundred dollars each; of which fourteen thousand six hundred and seventy-four shares have been issued, if said ten thousand shares are counted, or four thousand six hundred and seventy-four, if said disputed shares are not counted.

RHODES, J. The power of electing the Directors of a railroad corporation is lodged by the statute in the hands of the stockholders. The exercise of this power having been regulated by the statute, the corporation cannot, by its by-laws, resolutions, or contracts, either give or take it away. Were the statute silent in this respect, the election of the Directors, like the election or appointment of subordinate officers, would be subject to the regulation and control of the corporation, but the statute having expressly declared who shall be entitled to vote for Directors, its provisions are imperative upon the corporation, constituting a part of the law of its being; and the corporation has no authority to extend or limit the right, as regulated by the statute. The first section of the Act of 1861 (Stats. 1861, p. 607) provides that the first Board of Directors shall be elected by the subscribers to the stock, and subsequent sections provide that after the first election the Directors shall be elected by the stockholders—each stockholder being entitled to one vote for each share of stock which he owned for ten days next preceding such election. The clause, therefore, of the resolution of the Board of Directors giving Louis McLane authority to vote the stock transferred to him by the corporation, as well as the clause to the same effect in the agreement entered into by him with the corporation, was void.

It becomes necessary to ascertain the ownership of the stock voted upon by McLane. For this purpose the resolution of the Board of Directors, the receipt given for the stock and the agreement executed by McLane are to be construed together as constituting one transaction. The substance of the transaction is

that Wells, Fargo & Co. advanced to the Placerville and Sacramento Valley Railroad Company the sum of two hundred and sixty-eight thousand dollars, and the railroad company, as security for the money so advanced, issued to Louis McLane, as the trustee for Wells, Fargo & Co., ten thousand shares of the capital stock of the railroad company, to be retransferred to the company upon payment of the indebtedness for the money so advanced, and in proportional amounts as said payments should be made. The time of payment is not specified. The respondents contend that the transaction is neither a mortgage nor a pledge of the stock, but only amounts to a trust; and the appellants claim that the transaction constitutes a pledge. We are of the opinion that it is a pledge.

A pledge is a bailment of personal property as a security for some debt or engagement. (Story on Bailm., Sec. 268.) The general property in the thing pledged remains in the pledgor, and only a special property vests in the pledgee. A delivery to the pledgee of the thing pledged is essential to the contract, and until that act is performed the special property that the bailee is entitled to hold does not vest in him. In respect to most kinds of property, a delivery of the property to the pledgee, without any written transfer of the title, is sufficient to pass the requisite special property. Incorporeal property being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged. The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner. In Wilson v. Little, 2 N. Y. 443, the stock was transferred to the defendants, but the Court held that the contract amounted to a pledge of the stock. (See, also, Jewitt v. Warren, 12 Mass. 300; Bowman v. Wood, 15 Mass. 534; Dewey v. Bowman, 8 Cal. 145; Story on Bailm., Sec. 290, and following; Parsons on Cont. 595.) In Dewey v. Bowman it is said that the pledgee has not the legal

title to the property, and language of the same import is found in many cases. It was not intended to say in that case that the pledgee never receives the apparent legal title, but only that, as between him and the pledgor, the title, or more accurately, the general property, remained in the pledgor, for the subject matter of the contract was a lease which was assigned to secure the payment of a certain promissory note, and it was held that the contract was a pledge and not a mortgage. In Wilson v. Little, in speaking of the pledge of certain shares of stock, the Court say: "The general property which the pledgor is said to retain is nothing more than a legal right to the restoration of the thing pledged, or payment of the debt." A corporation, in pledging shares of its stock, which had not been issued at the time of making the contract, must, of necessity, issue them to the pledgee, or to some one for him.

The circumstance that the stock was issued to Louis McLane, as Trustee for Wells, Fargo & Co., instead of being issued in the name of the latter, does not alter the real nature of the transaction. McLane is described as the trustee of Wells, Fargo & Co., but his position and duties in respect to the stock, so far as either of the parties to the contract are concerned, is that of agent of the creditors. He is none the less a mere agent in the transaction because he is described as trustee. The transfer of the stock to him was in law a transfer to his principal, Wells, Fargo & Co. Had he been named as the agent of the creditors, there would be no room for doubt on this point. His true position in the transaction is to be determined, not by the title given to him, but by the acts and duties he is to perform; and these show that he bears the relation of agent to the creditors of the corporation.

The transaction lacks one essential element of a mortgage. A mortgage passes the title to the mortgagee, the mortgagor reserving the right to defeat the transfer and invest the title in himself by the performance of an express condition subsequent. Here no time was mentioned for the repayment of the money advanced, and the contract looked to the retransfer of the stock to the corporation. It is not claimed, on the part of the respondents, that McLane had any right to sell the stock, but it is admitted that he is to hold it until the money, or some part of it, is paid, and thereupon to retransfer the stock, or a proportional part of it, to the company. No other right in the stock is asserted for Wells,

Fargo & Co. than that claimed for McLane. This evidently is not such a title as is held by a mortgagee of personal property. We are satisfied that the contract is a bailment of the stock, and we are unable to give it any place among the different kinds of bailment except that of a pledge.

It results from this view of the contract that, as between the parties, the general property in the stock is in the pledgor—that the railroad company is its owner.

The question here is not whether the pledgee or a trustee to whom stock has been pledged or transferred by a stockholder, and who appears upon the books of the corporation to be the owner, is entitled to vote; but it is whether the agent or trustee of the pledgee, who is described in the Certificate Book of the corporation as a trustee, and who holds as such trustee or agent certain shares of stock which were pledged by the corporation to its creditor, is entitled to vote such stock. The designation of McLane as trustee was sufficient to show that he did not hold the stock in his own right, and as the corporation was one of the parties to the contract, its officers are chargeable with notice of the manner in which he held the stock. The case falls within the principle of Ex parte Holmes, 5 Cow. 426, in which it was held that there could be no vote upon stock owned by the company, though held by trustees; that it was not stock to be voted upon by anyone within the meaning of the charter or the general Act relating to that subject. Subsequent cases, like Ex parte Barker, 6 Wend. 510, though qualifying and restricting the broad language of Ex parte Holmes so as not to exclude the vote of a trustee upon the stock held in trust for a stockholder, have not questioned the doctrine that the stock belonging to the corporation, though held in the name of trustees, was not entitled to be voted upon. This doctrine must command the assent of everyone, unless it can be shown that a corporation can become a stockholder in the sense of the statute of its own stock, receiving from itself dividends, and responding to itself for calls for assessments, and being responsible for the debts of the corporation, first as a corporation, and second, as a stockholder. * * *

There is another view of the matter which appears to us to be equally decisive of the case. The whole Act proceeds on the theory that the certificates of stock are to be issued only upon the payment in full for the stock. * * *

We are of the opinion that the shares of stock issued to McLane to secure the payment of the money advanced to the corporation, were illegally issued, and were not entitled to be voted upon at the election for Directors, and that the plaintiffs received a ma- of business at said Green Bay. Prior to the transactions, in re- jority of the legal votes cast at the election.

Judgment reversed; and it is further ordered and adjudged that, at the election held on the 5th day of February, A. D. 1868, by the stockholders of the Placerville and Sacramento Valley Railroad Company, for the election of Directors of said corporation, C. W. Brewster, W. S. Burns, F. A. Bee, A. T. Melvin, R. Landecker, R. B. McBride, J. G. McCallum, W. H. Cooper, and O. H. Burnham, were duly elected Directors of said corporation.

FIRST NATIONAL BANK OF GREEN BAY v. DEARBORN, 115 Mass. 219.

(1874)

Replevin of one hundred barrels of flour.

At the trial the following facts appeared: R. G. Parks, residing and doing business in Green Bay, Wisconsin, under the name of R. G. Parks & Co., was engaged in the manufacture of flour at a mill in Neenah, in the State of Wisconsin, about thirty or forty miles from Green Bay. The plaintiff bank had its place gard to the flour in question, Parks had forwarded flour to Harvey Scudder & Co., at Boston, and drawn drafts upon them, only a part of which had been accepted and paid. On October 17, 1870, Parks applied to the plaintiff in Green Bay to advance $400 upon the one hundred barrels in controversy, which the plaintiff agreed to do. Parks then left with the plaintiff the following draft, addressed to Harvey Scudder & Co. of Boston: "$400. Office of R. G. Parks & Co., Green Bay, Wisconsin, October 17, 1870. At sight, pay to the order of M. D. Peak, cash, four hundred dollars, value received, and charge the same to the account of R. G. Parks & Co." Written in pencil across the face of the draft were these words: "Hold this till to-morrow when I will give you B. L."

On the following day Parks delivered to the plaintiff the following written instrument: "Chicago and Northwestern Railway

Company, Neenah, October 17, 1870. Received from R. G. Parks & Co. one hundred barrels of flour, branded W.—Rec. in rain. Consigned to Harvey Scudder & Co., Boston, Mass., via Green Bay. To be forwarded to Ft. Howard Station, upon the terms and conditions of the published tariff of this company. A. H. Boardman, Agent." The plaintiff thereupon placed to the credit of Parks on their books the sum of $400.

It was admitted by the defendant that Parks delivered the draft and the railroad receipt to the plaintiff for the purpose of securing the advance of $400 on the flour; and that it was the understanding that by that transaction the property was transferred to the plaintiff as security for its advance.

The flour, which in fact was at the time of the above transaction the property of Parks, and was at his mill in Neenah until it was delivered to the railroad company, and had not been seen by the plaintiff or Parks, had been delivered to the agent of the railroad company by the agent of Parks, on October 17, prior to the signing of the railroad receipt.

The plaintiff forwarded the receipt and draft to Boston, where the former was presented to Harvey Scudder & Co., who declined to accept it, giving as a reason therefor that they had not received the bill of lading; and they never in fact made any advance or payment on account of the flour, or received or offered to receive the flour. Shortly before the flour arrived at Boston, one of the firm of Harvey Scudder & Co. informed a member of the firm of Scudder, Bartlett & Co., who were creditors of Parks, that the flour was likely to arrive, and that Harvey Scudder & Co. had no claim upon it; and upon its arrival at the depot in Boston, about November 7, 1870, the defendant, a deputy sheriff, attached it as the property of Parks & Co., on a writ in favor of Scudder, Bartlett & Co., and the defendant held it under said attachment at the time of service of this writ.

If upon these facts the plaintiff is entitled to maintain the action, judgment is to be entered for the plaintiff, with nominal damages, otherwise for the defendant.

AMES, J. It appears that when the draft was discounted and the receipt delivered to the plaintiff, both parties understood that it was an advance by the bank, "on the flour." Both parties intended that the property should be, and understood that it was, by that transaction, transferred to the bank, as security for that

advance. The discounting of the draft was a sufficient consideration for such a conveyance. If there was a sufficient delivery of the property to the plaintiff, there was nothing to hinder the intention of the parties from going into full effect.

The character and situation of the property at the time of this transaction were such that an actual delivery was impossible. A constructive or symbolical delivery was all that the circumstances allowed, but a delivery of that nature, if properly made, would have been sufficient to give the plaintiff corporation the title to the property, and an immediate right of possession, which it could maintain, not only against Parks himself, but also against his creditors. Tuxsworth v. Moore, 9 Pick. 347. Fettyplace v. Dutch, 13 Pick. 388. Whipple v. Thayer, 16 Pick. 25. Carter v. Willard, 19 Pick. 1. The delivery of the evidences of title, with orders indorsed upon them, would be equivalent to the delivery of the property itself. Gibson v. Stevens, 8 How. 384. Nathan v. Giles, 5 Taunt. 558. National Bank of Cairo v. Crocker, 111 Mass. 163, and cases there cited. All that would be necessary in such a case would be that the thing actually delivered should have been intended as a symbol of the property sold.

In this case, the only thing which was delivered to the plaintiff, as the representative or symbol of the property intended to be transferred to the plaintiff, was the written acknowledgment of the railroad corporation that they had received the merchandise for transportation, consigned to Harvey Scudder & Co., of Boston. No order of any kind was indorsed upon this receipt, and no attempt was made to transfer it to the plaintiff in any mode, other than by mere manual delivery. But the receipt was evidence of ownership in Parks, and the only voucher which he had in order to show his right to the goods after parting with their actual possession. It was the means which he had of calling the carrier to account if the goods should be lost or injured, and it might well be supposed that the carrier would not ordinarily give up the goods except upon the production and surrender of that receipt. Whatever right Scudder & Co. might have had to take the flour into their own hands if they had accepted the draft, it is certain that on their refusal to receive the consignment, the property remained in the hands of the carrier as the property of the consignor, or any person deriving title from the consignor; the carrier would not be wholly relieved of responsi-

bility by the refusal of Scudder & Co. to receive the property, but would continue to be liable, at least for reasonable care in its custody, to the true owner.

It is true that a receipt of this kind does not purport on its face to have the quasi negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement, or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In Haille v. Smith, 1 B. & P. 563, Eyre, C. J., uses this language: "I see no reason why we should not expound the doctrine of transfer very largely, upon the agreement of the parties, and upon their intent, to carry the substance of that agreement into execution." In Allen v. Williams, 12 Pick. 297, 301, Shaw, C. J., in delivering the judgment of the court, says: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs." It is true that he adds that it was not necessary to place the case upon that ground. But this dictum was cited with entire approbation, in a case raising that exact point, in the Court of Appeals of the State of New York. Bank of Rochester v. Jones, 4 Comst. 497. In that case, as in this, the plaintiff had discounted a draft drawn against a quantity of flour, and its title, as in this case, depended upon a carrier's receipt, delivered to it without any written indorsement. The court held that the plaintiff thereby acquired a sufficient title to the property, and could call the consignee to account for it, he having converted the property to his own use, without accepting the draft. It is not necessary to hold that the plaintiff was absolute owner of the property; it is enough that it had a right of property and of possession to secure the payment of the particular draft;

and the right of the former owner, Parks, in the specific property, had become divested, leaving him only a right in the surplus money which might remain after a sale of the flour, and a payment of the draft from the proceeds. De Wolf v. Gardner, 12 Cush. 19, 24.

Some reliance was placed by the defendant's counsel upon certain local statutes and judicial decisions of the State of Wisconsin. But, if applicable at all, they do not in our judgment affect the decision of the case. If we are right in holding that there was a sufficient delivery to pass the property to the plaintiff corporation, the carrier must be considered, after that time, as its bailee, and as holding the property for it, and not in any adverse relation. His possession would be the possession of the plaintiff.

Our conclusion therefore is that the clear intent of the parties, that the property should stand as security to the plaintiff in discounting the draft, was carried into effect in a manner sanctioned by sound authorities, and that there are no special equities in favor of an attaching creditor that make it desirable to defeat that intent.

Judgment for the plaintiff.[1]

TAFT v. BOWKER AND TRUSTEE, 132 Mass. 277.

(1882)

Trustee process. The Milford Savings Bank, summoned as trustee, answered that, at the time of the service of the writ,

[1] Where goods are at sea (or landed at a sufferance wharf), the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods. Barber v. Meyerstein, L. R. 4 H. of L. 317.

Where there is merely a transfer of a non-negotiable document of title the document does not control the possession of the goods, and is not, therefore, a symbol of them. Accordingly there is no delivery. Hence where delivery is necessary for the transfer of a title good against subsequent purchasers or creditors of the seller, the rights of the transferee are inferior to those of the attaching creditor or the subsequent purchaser. Hallgarten v. Oldham, 135 Mass. 1; Williston, Sales, 738.

December 15, 1879, there stood on its books to the credit of the defendant the sum of $292.95. James F. Sawin appeared as claimant of the funds in the hands of the trustee. Trial between the plaintiff and the claimant, the defendant having been defaulted, in the Superior Court, without a jury, before Aldrich, J., who reported the case for the determination of this court, in substance as follows:

The claimant testified that, on August 24, 1874, he lent the defendant $420, and took his promissory note for that amount payable on demand, with Bowker's bank-book as collateral security; that there was no written assignment of the book.

FIELD, J. The report states that, "upon this evidence, I found as a matter of fact that there was no assignment (prior to the service of the trustee process) to Sawin of the funds in the bank belonging to Bowker, and that all the parties intended was that the book delivered by Bowker to Sawin should be held by the latter as collateral security, and that the delivery of the book was not accompanied by any assignment of the fund represented by the book. I therefore found the claimant had not maintained his claim, and ordered the trustee to be charged upon its answer."

It is manifest that the learned justice means by this language that he found that there was no express assignment of the fund, and that no writing was executed and delivered which in legal effect was an assignment of the fund, and that he ruled, as matter of law, that a delivery of the bank-book by Bowker, to Sawin, with the intention that it should be held by Sawin as collateral security for the payment of Bowker's debt, did not constitute a valid equitable assignment of the fund as against the trustee process.

That a delivery of a savings-bank book with the intention of transferring the title to the money deposited transfers the equitable title to the deposit has been decided in Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425.

That the book was delivered with the intention that it should be held as collateral security does not affect the application to this case of the principle established by that decision. Such an equitable title must prevail against the trustee process. Norton v. Piscataqua Ins. Co., 111 Mass. 532.

New trial ordered.

BORLAND, ETC., v. NEVADA BANK OF SAN FRANCISCO, 99 Cal. 89; 33 Pac. 737.

(1893)

Appeal from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial.

HARRISON, J. The plaintiff seeks to recover from the defendant as a stockholder in the Wyoming and Dakota Water Company its proportionate liability of certain indebtedness of that corporation to the plaintiff. The case was tried in the court below without a jury, and judgment rendered in favor of the plaintiff, from which and an order denying a new trial the defendant has appealed.

In 1877, August Hemme, being heavily indebted, contemplated going into bankruptcy, and as the defendant was one of his creditors to the amount of several hundred thousand dollars, Mr. Flood, who was its vice-president, proposed to him that if he would turn over to the bank what property and securities he held, it would carry him through. Hemme's indebtedness to the bank was evidenced by several promissory notes upon which he had given collateral security, and in response to this proposition of Mr. Flood he turned over to the bank various properties, upon which the bank thereafter from time to time realized by sales, and applied the amounts to his credit. In March, 1880, Flood, having learned that Hemme had certain shares of stock in the above-named corporation which he had not turned over to the bank, sent for him, and upon his demand that this stock should be given up to the bank, Hemme caused the same to be transferred on the books of the corporation from the name of his wife into that of George B. Bailey, trustee, and delivered the certificate therefor to Flood. Bailey was an employe in the bank, in whose name all securities held by the bank, whether as proprietor or collateral, were placed and held by him as trustee for the bank. It does not appear that any entry of the transaction was made upon the books of the bank, and the certificates for the stock were themselves placed by one of the employes of the bank in an envelope and marked as held as security against Hemme's account. At this time the bank still held some of the other property which had been turned

over to it in 1877 undisposed of, and disposals thereof were thereafter made from time to time, and the proceeds placed to the credit of Hemme's account. This stock, however, was never disposed of by the bank, but diminished in value so that it was regarded of no value whatever, and the notes themselves became outlawed, and in 1882 were surrendered to Hemme, at which time he made a written assignment of the stock to the bank.

It is contended by the plaintiff that the transaction between Hemme and Flood was an absolute transfer of the stock, by which the entire title thereto was vested in the bank, while the defendant contends that the stock was received and held by it only as a collateral security for the indebtedness of Hemme; and upon the determination of this disputed point hinges the liability of the defendant, for if it took the stock as security merely, it was not a stockholder, liable for the debts of the corporation, while if it became the absolute owner thereof, it is chargeable with its proportionate liability of the corporate debts. Section 322 of the Civil Code declares: "Each stockholder of a corporation is individually and personally liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. * * * The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of the stock, although the same appear on the books in the name of another. * * * Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor or person or estate represented is to be deemed the stockholder as respects such liability."

The transaction cannot be regarded as a sale of the stock from Hemme to the bank. There was nothing said by either party in reference to buying or selling the same, nor was the value of the stock agreed upon or even discussed; nor was any price fixed at which Hemme would part with it or Flood accept it. Story, in his treatise on Sales, section 1, defines a sale to be "a transfer of the absolute title to property for a certain

agreed price," and in section 217 of the same treatise states that the price required in a contract of sale must be: 1. Money or its negotiable representative; 2. Certain and definite, or capable of being rendered definite; 3. An actual price, seriously intended to be exacted. Section 1721, of the Civil Code defines a sale to be "a contract by which for a pecuniary consideration called a price, one transfers to another an interest in property." It is not necessary, however, that the price for which property is sold shall be money only, or that it shall be actually delivered at the time of the transaction. The term, as here used, is equivalent to compensation. (Hudson Iron Co. v. Alger, 54 N. Y. 177.) But as values are expressed in money units, a sale implies a reciprocal transfer of this compensation, past, present, or future, whose value in money is agreed upon between the parties. It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale, but the price itself must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. In addition to the necessity for a price, there must be the assent of the parties that the transaction shall be a sale. This must be an express agreement, or such an implication must follow from the nature of the transaction itself. The mere transfer of possession without the agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale or have the effect to transfer the title. The testimony of Grayson that at some time subsequent to the transfer of the stock Flood spoke of the transaction as a "purchase," cannot be used to determine the nature of the transfer. Flood, as the agent of the defendant, could not bind it by any admissions or declarations respecting the character of the transaction, which he might subsequently make in reference thereto. (Beasley v. San Jose Fruit Packing Co., 92 Cal. 388.)

Neither can the transaction be regarded as a payment by Hemme upon the amount of the indebtedness against him held by the bank. Payment, like sale, can result only from the mutual agreement of the parties that the transaction shall have that effect, and without such consent the transaction cannot be treated by the court as a payment. Technically, payment can be made only in money. It is defined in the Civil Code to be "perform-

ance of an obligation for the delivery of money only." (Sec. 1478.) Payment may, however, be made in merchandise or any commodity other than money which the parties to the transaction agree shall be accepted as payment, but the consent of the creditor to accept as payment the thing received is as essential as the purpose of the debtor that it shall have that effect. "The acceptance of any valuable thing in discharge of the debt amounts to payment, but it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment. Without this, the transaction is regarded either as furnishing matter of set-off or as security collateral to the original debt, according as the subject received is in possession or in action." (Covely v. Fox, 11 Pa. St. 174.) But, although the receipt of a commodity by a creditor from his debtor at an agreed valuation, with the agreement that the sale shall be applied in a credit upon the debt, is equivalent to a payment, both of these elements are wanting here. If it was the purpose of Hemme to transfer the stock in part satisfaction or in payment of his obligation to the bank, such purpose was ineffectual without the assent of the bank.

Inasmuch as no express agreement between the parties relative to the character of the transaction, and no statement by them, or either of them, of the character in which it should be treated, was shown at the trial, we are compelled to determine their rights according to the principles of law applicable to such a transaction in the absence of any agreement. In other words, we are to ascertain what legal presumption would arise from the transaction in view of the circumstances under which it was had, having reference also to the relation which the parties held to each other. If there had been no previous relations between them, the deposit of the stock would constitute a mere bailment, for there is nothing indicative of a gift, and it is not pretended that such was the intention of either of the parties. The owner of property remains such until he is divested of his ownership by law, or by his voluntary act. The mere transfer of his property to another does not divest him of his ownership, unless such was his intent, and manifested by suitable acts. If the person to whom the transfer is made is his creditor, his ownership will none the less be retained in the absence of any evidence respecting his motives in making the transfer,

and even if it was his purpose to divest himself of his title thereto, or to make a transfer in satisfaction or payment of his obligation, either in whole or in part, such purpose would be ineffectual without the consent of the creditor to receive it therefor; yet, as it must be presumed that the parties to such transaction made the transfer for some purpose, and as their act is entitled to receive consideration, the transaction will be regarded as having been made in accordance with their presumed motive. The law will make the inference therefrom that by the transaction they intended to effect that which would be of mutual benefit to each without causing a loss to either, or giving to either an advantage which would not be presumed to have been within their contemplation. Hence, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt. Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Especially does this presumption arise if the property given is itself a chose in action or a security of a different nature from the debt, whose value is neither intrinsic nor apparent, and is not agreed upon by the parties, for the reason, as was said by the supreme court of Pennsylvania, in Leas v. James, 10 Serg. & R. 315: "Such assignment is not in its nature a payment. It puts no money in the hands of the creditor, but only gives him the means of collecting money from another." The duty of establishing the contrary is affirmative, and it rests upon the debtor. If he fails to perform this duty the law makes the positive inference that the assignment is only as collateral security. (Jones on Pledges, sec. 17; Colebrooke on Collateral Securities, sec. 29; Eby v. Hoopes, 1 Pennypacker, 177; Bayard v. Shunk, 1 Watts & S. 94; 37 Am. Dec. 441; Stone v. Miller, 16 Pa. St. 450; Perit v. Pittfield, 5 Rawle, 166; Caldwell v. Fifield, 24 N. J. L., 150; Sutphen v. Cushman, 35 Ill. 186; Harris v. Lombard, 60 Miss. 29.) The debtor cannot make his creditor a forced purchaser of the property or compel him to exchange his obligation for the property transferred, and this is eminently the case where no

value is agreed upon, or even spoken of at the time of the transfer. The burden is always upon the debtor to show that a substituted performance of his obligation to pay money was accepted by the creditor as the equivalent of payment, or in satisfaction of the obligation. Taking the promissory note of a third party from the debtor will always be regarded as given for collateral security unless proof is made that it was given and received as payment. (Brown v. Olmsted, 50 Cal. 162.) "The mere acceptance, by the creditor of a negotiable note of a third person makes it but collateral security; when such a note is given for a pre-existing debt the presumption is that it was not the intention of the parties that it should operate as an immediate and absolute satisfaction and discharge of the debt, and nothing short of an actual agreement, or some evidence from which a positive inference of discharge can be made will suffice to produce such effect." (Wilhelm v. Schmidt, 84 Ill. 187.)

There is no evidence in the record herein which tends to rebut this presumption that the stock of the water company was taken and held by the defendant as collateral security for the debt of Hemme. Hemme testified that in March, 1880, when Flood sent for him and demanded the stock, he went out and brought in a certificate for twenty-four thousand shares which stood in the name of his wife, and that at Flood's request he thereupon caused it to be transferred on the books of the corporation to the name of Bailey, and then delivered the certificate to Flood; that he estimated the stock to be of the value of from two and a half to three dollars per share; that nothing was said, either by Flood or himself, about the value of the stock, or concerning the amount with which he should be credited therefor; nor was anything said as to the amount of the purchase price, or any sum fixed at which he should be allowed credit upon his account; that in June, 1880, Flood, having learned that he had four thousand other shares of stock, again sent for him and demanded this stock also; and that, after having it transferred into the name of Bailey, he brought the certificates to the bank and laid them down on the desk in front of Flood and walked out without saying anything, and that no mention was then made of money or price to be allowed him therefor. This is, in substance, all the evidence of what was said by either Flood or Hemme at the time of the transaction, and, in the absence of any statement or agree-

ment by the parties concerning the relations thereafter to be held by them respectively to the stock, it becomes necessary to apply the foregoing principles of law to determine that relation. For this purpose it is also proper to consider the relations which Hemme and the bank held to each other, as well as any circumstances which would give to Flood a reason for demanding the stock, or to Hemme a reason for delivering it. Hemme was still heavily indebted to the bank upon the obligations for which he had given various collateral securities in 1877, many of which were still held by the bank, undisposed of. His indebtedness at that time amounted to several hundred thousand dollars, and Flood had said to him that, if he would give him what securities he had, he would carry him through. Accordingly, Hemme turned over to the bank a line of securities whose value was estimated to be nearly four hundred thousand dollars, and the bank thereafter proceeded to realize upon them, but they were insufficient to meet the amount of the indebtedness. In view of the fact that Flood's agreement with Hemme was based upon the implied promise of Hemme that he would turn over what he had, we find ample reason for Flood, when he learned that Hemme had this water stock, to demand that it should be turned over to him, and also for Hemme to comply therewith; and, even if there were no other evidence in the case, it would follow that the bank would be regarded as holding the stock in the same capacity as it held the property which was turned over to it in 1877. There is no evidence in the record tending to show that the transfer in 1877 had any other character or effect than to operate as a collateral security for the indebtedness, and the relation of the parties at the time it was made, as well as the interview between Flood and Hemme prior thereto, and the subsequent dealings of the bank with the property, as well as the statement of some of the plaintiff's witnesses, are confirmatory of the presumption that it was held as collateral security for that debt. * *

We have carefully examined the record, and are satisfied that there was no evidence before the court to sustain its finding that the defendant was the owner of the stock in question; and for that reason its judgment and order denying a new trial are reversed.

HOGUE v. MINNESOTA PACKING & PROVISION CO.,

59 Minn. 39; 60 N. W. 812.

(1894)

Appeal by defendant, the Minnesota Packing and Provision Company, a corporation, from an order of the District Court of Hennepin County, Charles B. Elliott, J., made March 24, 1894, denying its motion for a new trial.

MITCHELL, J. The facts found by the court, and supported by the evidence, are as follows: In December, 1872, the Travellers' Insurance Company of Hartford, Conn., issued to plaintiff, as beneficiary, a policy of insurance upon the life of her husband.

One of the stipulations in the policy was that "no assignment of this policy shall be valid unless made in writing, indorsed hereon, and unless a copy of such assignment shall be given to this company within thirty days after its execution." In June, 1874, the plaintiff, in writing, indorsed thereon, assigned the policy to her husband. A copy of this assignment was given to the company, within thirty days. Thereafter, the husband, "with the desire and intent to restore the title to said policy in the plaintiff," erased the assignment indorsed thereon, and returned the policy to her, and she afterwards kept it in a writing desk in her room. Subsequently, the husband, without the knowledge or consent of the plaintiff, took the policy, and pledged it to one Van Norman, as security for a debt of his own. Plaintiff, on learning of this, demanded of her husband a return of the policy. Thereupon the husband executed and delivered to her a written assignment of the policy, "with the intent and desire on part of both parties to vest the complete title to the policy in the plaintiff." But, the policy being then in the possession of Van Norman, and never after having come into the control of the plaintiff, this assignment was never attached to or made a part thereof, and, so far as appears, was never given to or filed with the insurance company.

Thereafter, the husband, without the knowledge or consent of plaintiff, pledged and delivered the policy to defendant, as collateral security for an indebtedness owing from him to it. It probably appears from the evidence that this pledge of the policy by the husband to defendant was in part as security for money

to be thereafter advanced by it to him; and that this money was in part used in paying the debt due from the husband to Van Norman; and that upon that being done, the possession of the policy was transferred from Van Norman to defendant. But, as we view the case, these facts are not material.

The debt due from the husband to defendant being still unpaid, the latter refused to deliver the policy to plaintiff, whereupon she brought this action to recover the possession of it, or its value.

The policy being in no sense negotiable paper, and there being no case, upon the facts, for the application of the doctrine of equitable estoppel, the defendant must prevail, if at all, upon the ground that the policy is the property of the husband, for the reason that the reassignment of it by him to plaintiff is invalid, because not indorsed and a copy of it given to the company, as required by the stipulation in the policy above quoted.

It is well settled that a policy of life insurance, where the policy contains no provision to the contrary, is assignable as any other chose in action; at least, provided the assignee has an insurable interest in the life of the insured, which, of course, the wife has in the life of her husband. The great weight of authority would seem to be that, in the absence of restrictive words, there is not even this limitation upon the assignability of such policies. But on this point we have no occasion to express an opinion. It will be observed that the provision of this policy is not that an assignment of it without the consent of the company shall be void,—a very common provision, the object of which is, doubtless, to prevent speculative or gambling insurance, which might increase the risk.

In this case the consent of the company to an assignment is not necessary. All that is required is that the assignment be in writing on the policy, and a copy of it furnished to the company, within thirty days. This provision is not one which is intended to guard against increased risks, and does not go to, or infuse itself into, the essence of the contract. Its sole purpose is to protect the company against the danger of having to pay the policy twice, by requiring written evidence of any change of beneficiaries to be put into reliable form, and promptly furnished to the company.

All that could, at the very most, be claimed as the effect of a noncompliance with this stipulation, is that the company might disregard the attempted assignment, and pay the money to the original beneficiary; in other words, such attempted assignment would be merely voidable at the option of the company. The provision being exclusively for the protection of the company, it might waive its requirements if it saw fit.

The assignment in this case from the husband to the wife would be perfectly good as between the parties; and if, in case of his death, the insurance company saw fit to pay the money to the wife, those claiming under the husband would not be heard to object because the assignment was not indorsed on the policy, or given to the company. This, it seems to us, is decisive of this case.

The objection to the assignment is not one that can be raised by the defendant, or by anyone except the insurer. It is urged, however, that the defendant is subrogated to the rights of Van Norman. We fail to see how the mere fact that some of the money advanced by the defendant to the husband was used to pay his debt to Van Norman could have that effect, even if Van Norman had any rights as against the plaintiff. But, upon the facts found, Van Norman had no such rights.

The parol assignment of the policy to the plaintiff by her husband, accompanied by delivery, made her the equitable owner. Chapman v. McIlwrath, 77 Mo. 38.

The subsequent taking of the policy from the possession of plaintiff was a wrongful act on part of the husband, and Van Norman could acquire no greater rights to it than the husband had. The written assignment of the policy by plaintiff to her husband having been canceled by the erasure of plaintiff's signature, it appeared on the face of the policy that the wife was the beneficiary; and hence, as already suggested, there was no room for invoking the doctrine of equitable estoppel.

Order affirmed.[1]

[1] Constructive delivery.—14 Harv. L. Rev. 303.
Pledge of membership in stock exchange.—16 Harv. L. Rev. 70.
Pledge by broker of stock purchased on margin.—19 Harv. L. Rev. 529.
Pledge of future (or after acquired) chattels.—"So far as concerns the propriety of enforcing specifically a contract to give a pledge the reasoning applicable is identical with that appropriate to the case

2. Obligations of Bailee (Pledgee)

THE COMMERCIAL BANK, ETC., v. MARTIN ET AL.,

1 La. Ann. 344.

(1846)

Slidell, J. The plaintiff concedes that two of the notes sued upon in this case are prescribed. A third note originated under the following circumstances: On the 3d August, 1837, the Commercial Bank discounted for Brander, McKenna & Wright, a note drawn by Dickens, Webb & Co., and endorsed by Brander, McKenna & Wright, and by the defendants. This note became due, and was protested for non-payment, on the 3d March, 1838. On the 18th June, 1838, the bank discounted a note of Brander, McKenna & Wright, endorsed by the defendants for $3,230, "to take up," as is said by the witness, the note of Dickens, Webb & Co. The note for $3,377.93 now sued upon, which is drawn and endorsed in like manner as the preceding, is the renewal of the note discounted the 18th June, 1838, and bears at its foot the following memorandum—to "renew Dickens, Webb & Co."

Soon after the maturity of the note of Dickens, Webb & Co., but at what precise time is not shown, Martin, one of the defendants, called upon the bank and requested it to place this note of Dickens, Webb & Co., in the hands of an attorney in Alabama,

of a contract to give a mortgage. Damages are an inadequate remedy. It seems probable that the English law would recognize that an agreement to pledge future property creates an equitable lien upon the agreed property when it becomes specified. Such an agreement, however, if written, seems within the statutory definition of a bill of sale, and (prohibitions of bills of sales of future goods would apply to contracts to pledge). In this country the rules that require transfer of possession or record of mortgages of chattel property are also generally applicable. A pledge of existing goods derives its efficacy from the possession of the pledgee. Whatever may be the effect of permission to the pledgor to have possession for a temporary and special purpose (Jones on Pledges § 44) there can be no doubt that the unqualified entrusting of the pledge to the pledgor would destroy the pledgee's security, so far as concerned innocent third persons, whether creditors or purchasers. Equity cannot give a greater effect to a promise to pledge future goods than to a pledge of existing goods of which possession has been surrendered upon the promise of the pledgee still to regard them as security for the debt and to return them upon demand. The situation in the two cases is the same as soon as the future goods come into existence, and before that time there can of course be no question of lien." Williston in 19 Harv. L. Rev. 583; Hitchcock v. Hasselt, 71 Cal. 331.

to whom the Mechanics and Traders Bank, who also held a note of the same parties and under like circumstances as regards the defendants, had, on the same day, as Martin represented, transmitted their note. The bank refused to send it to the same attorney, but said they would transmit it to the attorneys usually employed in Alabama by the plaintiffs. On the 19th July, 1838, the plaintiffs transmitted the note for suit to its attorneys in Alabama, who received it on the 20th July, 1838, and brought suit returnable at the next ensuing term of the United States Court. An examination of the acts of Congress satisfies us that the November term, 1838, of the United States Court in Alabama, to which Dickens, Webb & Co. were cited, and in which court both suits were brought, was the earliest term after the month of June, 1838, when, according to the testimony, the note in question became, as urged by the defendant, a collateral security to the claim now sued upon. It appears that the note put in suit by the Mechanics & Traders Bank was brought to judgment at April term, 1839. The plaintiffs' attorneys recovered judgment at the fall term, 1839, and a writ of fieri facias was seasonably issued, and was returned "no property."

The defendants contend that they have been discharged; that the judgment should have been obtained, and a fieri facias issued as soon in this case, as in the suit of the Mechanics & Traders Bank, who collected their debt; and also that a ca. sa. should have been issued. Upon these grounds they obtained a favorable judgment from the court below.

We think the court erred. If, under the anomalous contract which is here presented, the note of Dickens, Webb & Co. is to be considered a collateral security for the renewed note of Brander, McKenna & Wright, and its subsequent renewals, which is the interpretation invoked by the defendants, and the one most favorable to them, there is still no legal defense. If we look to the request of the defendants, it was complied with. The bank did not give Martin, Pleasants & Co. the control of the note, nor send it to their attorney; but sent it, in good season, to the attorneys whom it usually employed in its own business, and whom, in the absence of contrary evidence, we may fairly presume to have been competent and faithful. If, on the other hand, we look to the duty of the bank, as mere pledgees, that duty has been fairly performed. The care must be that of a prudent adminis-

trator—in the French text, "un bon père de famille." So in the Roman law: Ea igitur, quae diligens paterfamilias in suis rebus praestare solet, a creditore exiguntur. He is not subjected to the requisition of the most exact diligence. Pothier, Nantissement, chap. 11, art. 11, §§ 32, 33, 34. 2 Kent, p. 579. The bank was obliged to act through attorneys at law in Alabama, and it did for the defendants, and at their request, what it would have done in its own affairs. The duty of a pledgee cannot be considered as more onerous and stringent than that of an agent, and the law is well settled that where, in the course and from the nature of the business, it becomes necessary to employ sub-agents by reason of their particular profession or skill, the agent will not, in such cases, be responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. See Story on Agency, p. 190. Paley on Agency, pp. 9, 45, and Baldwin v. Bank of Louisiana, ante p. 13. It is not pretended that in this case, an improper choice was made; nor is there even any reason for charging the attorneys employed in Alabama with neglect of duty. Many circumstances beyond his control might have prevented the most diligent attorney from bringing a cause at once to trial, and, in the absence of proof of negligence, we have no right to presume it because another attorney got judgment one term earlier.

It is further contended by the defendants that the bank should have pushed the execution of the judgment to a ca. sa. The case of Flowers v. McMicken, 2 Mart. N. S. 132, cited by the defendants, if recognized in its full extent, does not cover the present case. There the defendant's contract was that he would be responsible for a note drawn for another, if the plaintiff should, without success, use all necessary steps for its collection from the maker, without delay. In addition to the consideration that the bank had entrusted the business to the attorneys in Alabama, we cannot construe the duty of a mere pledgee so strictly as to say that he is bound, without the pledgor's request, to incarcerate the debtor, whose obligation is given in pledge. If the pledgors desired to deal thus harshly, they might very easily have taken the weapons of the law into their own hands by paying their creditor, or at least have intimated their desire for such a course. No such request is

shown; nor is it proved that the defendants have sustained any damage, by the not resorting to this extreme remedy.

As regards the debt secured by the Nailor note, we are not prepared to say that the court erred. That note remains entirely unaccounted for, though Nailor, as is proved, was solvent for a considerable time afterwards. The plaintiffs have either collected it, or lost its amount by negligence.

It is therefore agreed that the judgment of the court below be reversed, so far only as relates to so much of the suit of the plaintiffs as claims the recovery of the amount of the note for $3,377.93, due the 3d July, 1840, and in the petition particularly described; and it is further decreed that upon said note there be judgment in favor of the said Commercial Bank of New Orleans, against the said Martin, Pleasants & Co. and against John Martin, —— Pleasants, and Hugh Wilson, partners of said firm, in solido, for the sum of $3,377.93, with interest thereon, from the 3d day of July, 1840, until paid, and the costs in both courts.[1]

ST. LOSKY ET AL. v. DAVIDSON ET AL., 6 Cal. 643.

(1856)

The plaintiffs brought their action for damages for injuries occurring to certain cases of cigars by the negligence of defendants. The plaintiff pledged to defendants a lot of cigars to secure certain notes. The written memorandum, signed by the plaintiff, contained the following words: "We have this

[1] "In the reign of Edward III., (29 Ass. 163, pl. 28) the case of a pledge came up, which seems always to have been regarded as a special bailment to keep as one's own goods. The defense was, that the goods were stolen with the defendant's own. The plaintiff was driven to reply a tender before the theft, which would have put an end to the pledge, and left the defendant a general bailee. Issue was taken thereon, which confirms the other cases, by implying that in that event the defendant would be liable." Holmes, The Common Law, 176.

"If a man pledge goods to B and they are stolen, (that is robbed), B shall not answer for them, because he hath a property in them; and his custody is but a consequent of that property, and therefore he doth undertake to keep them as his own (Southcote's Case, 4 Coke 83); though a man that undertakes to secure what is another's, is bound to keep them at all adventures, since the right owner might possibly defend them with his life; but where a man is only obliged to keep them as his own, no unavoidable accident is to be imputed to him." Bac. Abr. Bail. B.

day delivered, as collateral security for the above note, to the said Emanuel Berri, eighty-two cases of cigars, who has stored the same in the Bay Warehouse at our risk and expense." The cigars were deposited in the Bay Warehouse as the property and subject to the order of Berri, one of the defendants. Afterwards, on account of some injury to the warehouse, the keeper, without the order or knowledge of the defendants, removed them to another place which was damp and unfit for the storage of such goods, and in consequence of the removal the cigars were damaged and their value greatly impaired. The court below nonsuited the plaintiffs. Plaintiffs appealed.

MR. JUSTICE TERRY (Chief Justice Murray concurred). A pledge is a bailment which is reciprocally beneficial to both parties. The law therefore requires of the pledgee the exercise of ordinary diligence in the care and custody of the goods pledged, and he is responsible for ordinary negligence. (Story on Bailments, §§ 323, 332). What will amount to ordinary negligence must depend on the circumstances of the transaction, and the character of the pledge. In general, it may be defined to be the neglect to exercise that degree of care which an ordinarily prudent man usually bestows upon his own property of a like description.

Was the liability of defendants changed by the stipulation, and if so to what extent?

It is contended that it was competent for the parties to stipulate for a different degree of liability to that which would attach in the absence of an express contract, and that the words, "stored in the Bay Warehouse at our risk and expense," operated to discharge the defendants from all responsibility on account of damages from any other cause than intentional fraud of defendants.

We do not give the words cited a construction so comprehensive. In our opinion they could operate to release the defendants from responsibility only while the goods remained in the place designated. Upon their removal it was avoided, and the defendant's liability was such as by law attached under like contracts.

The fact that the goods were removed by the keeper of the warehouse without the direction or knowledge of defendants, is not material; it was their duty to see that goods were kept in

the place agreed on, or, if a removal was necessary, to have them stored in a secure and proper place. The keeper of the warehouse, as the agent or bailee of defendants, is responsible to them for any damage resulting from his unauthorized acts.

Judgment reversed and cause remanded.

THE THIRD NATIONAL BANK OF BALTIMORE v. BOYD, 44 Md. 47.

(1875)

On the morning of Monday, the 19th of August, 1872, when the officers of The Third National Bank of Baltimore arrived at the bank, it was discovered that since the close of business on Saturday evening, the vault and safe of the bank had been broken into by burglars, and robbed of a large amount of money and valuable securities. The entrance had been effected through the walls of an adjoining building, belonging to Mr. John S. Gittings, by tenants of that building, who had rented it doubtless for the express purpose of carrying out the scheme of plunder. By appropriate and ingenious tools, the walls of both buildings, and of the vault, and the iron plates between the double walls of the vault had been perforated, and the safe within forced open. Among the valuables taken were some $64,000 in money belonging to the bank; $10,000 in the custody of the paying teller; $40,000 of coupon bonds belonging to the family of the acting president of the bank and in his custody; and various coupon bonds belonging to the appellee, the market value of which at that time was nearly $26,000.

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellee, to recover the value of certain coupon bonds and stocks, that passed like bank notes, by delivery; which had been deposited by the plaintiff with the defendant, and which had been stolen from the defendant, in consequence of its alleged failure to exercise ordinary care in the custody of them.

The case is one that, from its nature, depended at the trial below, mainly on the questions of fact arising upon the evidence, with regard to the manner in which the bonds were lost, and the vigilance and care exercised by the bank in their custody.

These were questions exclusively for the jury, whose province it was to decide whether there was any want, or omission of ordinary care and diligence on the part of the bank, from which the loss of the plaintiff's property resulted. These questions were submitted to the jury by the Circuit Court, were decided by them against the bank, and we have no authority or power to review their verdict.

All the prayers asked by the defendant, being either conceded by the plaintiff's counsel or granted by the Circuit Court except the tenth; the only matters presented for our consideration on this appeal, arise upon the defendant's tenth prayer, which was refused; and the first, fourth, fifth, sixth and seventh prayers of the plaintiff, which were granted.

It appears by the evidence that the appellant was a Bank organized under "the National Currency Act of 1864." The firm of William A. Boyd & Co., of which the appellee was senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th day of February, 1866, the firm was indebted to the bank about $5000, when the appellee voluntarily proposed to the president of the bank, to deposit with the bank a large amount of bonds, about $37,000, as collateral security for his present and future indebtedness. The terms of the deposit as agreed on between Mr. Boyd and the president, were dictated by the latter to the discount clerk— and were as follows:

"Third National Bank, February 5th, 1866.

William A. Boyd has deposited with the Third National Bank of Baltimore $20,000 in United States 5-20 bonds, and $1500 5-20 July, 1865; $5000 Hudson County, New Jersey; $5000 Town of Saratoga, New York, 7 per cent. bonds; $5000 Stock of Third National Bank of Baltimore, as collateral security for the payment of all obligations of Wm. A. Boyd and Wm. A. Boyd & Co. to the Third National Bank of Baltimore, at present existing. or that may be incurred hereafter, with the understanding that the right to sell the above collaterals in satisfaction of such obligations, is hereby vested in the officers of the Third National Bank.

(Signed) A. H. Barnitz,
Discount Clerk."

This paper was kept by the cashier of the bank in the same envelope with the bonds,—afterwards memoranda were enclosed therein, signed by the appellee's attorney and by the cashier, showing that certain of the bonds originally deposited had been withdrawn, and others deposited to replace them.

It appears from the evidence "that while these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about $4000 on deposit, and from time to time as it needed, obtained discounts ranging from $2000 to $15000 on the security of the collaterals, but frequently, and for considerable times, as much as five months at a time, it sometimes owed the bank nothing, but left the bonds in its vault; that at times when the firm wanted money for a very short time, it had obtained it from the bank, on the security of these collaterals on what were called 'call loans' by checks such as the following:

Baltimore, July 13, 1871.

"Third National Bank of Baltimore pay to order of call loan on general collaterals, four thousand dollars.

William A. Boyd & Co."

"The firm was not indebted to the bank subsequent to July 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left with the defendant, under the original agreement." * * *

The defendant, by its tenth prayer, asked the Court to instruct the jury "That the defendant had no power by the Act of Congress, under which it was incorporated, to assume and undertake the keeping of the plaintiff's bonds, while they were not held as collateral security for debts owing to it, and if the jury shall find that when the bonds were stolen * * * there was not and had not been for nearly three weeks, any indebtedness for which they were held as security, then the plaintiff cannot recover in this action."

This prayer raises the question of the power of the bank to accept and retain the deposit of the plaintiff's bonds, in the manner and for the purpose disclosed in the evidence. Having been organized under the Act of Congress of 1864 ch. 106, the powers of the bank are limited and defined by the provisions of that Act.

By section 8, it is authorized, "to exercise all such incidental powers as shall be necessary to carry on the business of banking by discounting promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this Act." * * *

There is very strong ground, both upon reason and authority, in support of the proposition that a National Bank, deriving its existence and exercising its powers under the Act of Congress referred to, is not authorized to enter into a contract as a mere gratuitous bailee, by receiving on special deposit for safe-keeping merely, coin, jewelry, plate, bonds or other valuables. Such a contract does not appear to be authorized by the terms of the 8th section, as a transaction "within the ordinary course and business of banking or incident to it"; and has been decided by the Supreme Court of Vermont, to be unauthorized by the law, and beyond the scope of the corporate powers. Wiley v. First National Bank of Brattleborough, 47 Verm., 546. The very well considered opinion by Judge Wheeler in this case, will be found in The American Law Register, N. S., Vol. 14, p. 342, accompanied by an able note from the pen of Judge Redfield, in which the cases are collected and reviewed.

In the case of The First National Bank of Lyons v. The Ocean National Bank, 60 N. Y. 278, the Court of Appeals of New York have recently made a similar decision.

Assuming these decisions to be correct, and we are not disposed to question their soundness; it is clear that the contract entered into by the bank in this case, was not a mere gratuitous bailment. As shown by the paper of February 5th, 1866, the bonds were not received on special deposit, for safe-keeping merely, but were received as collateral security for a debt then existing, and for all obligations that might thereafter be incurred by the depositor.

We entertain no doubt of the power of the bank to enter into a contract of that kind. To accept such collateral security for existing debts, and for future loans and discounts is a transaction within the usual course of the business of banking, and incident thereto, and therefore within the terms of the Act of Congress.

The power of National Banks to receive such deposits, was distinctly recognized by the Supreme Court of Vermont, and the Court of Appeals of New York, in the cases before cited, and we are not aware that it has ever been questioned. On this point we refer to the able opinion of Judge Sharswood, in Erie Bank v. Smith, Randolph & Co., 3 Brewster, 9.

In Maitland v. The Citizens' National Bank, 40 Md. 540, this Court affirmed the right of a National Bank to receive on deposit, the note of a third person as collateral security for future loans or advances to the depositor.

The original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit, did not cease when the appellee's debt had been paid. There is no evidence that the contract was changed, on the contrary, the evidence shows "the bonds remained with the bank under the original agreement." As collateral security for any indebtedness of the appellee that might thereafter accrue, and for any liability of himself or of the firm of which he was a member, or any paper signed or endorsed by them, which might at any time be held by the bank. For these reasons the Circuit Court committed no error in refusing the appellant's tenth prayer.

The appellant's counsel have argued that the memorandum of February 5th, 1866, cannot be construed as a contract made by the appellant, because it does not appear that the officers by whom it was made, were authorized to bind the bank.

This point is not properly before us, was not made in the Circuit Court, and is not presented by the bill of exceptions. All the prayers of the appellant go upon the theory, that the bonds were held by the bank as collateral security.

But even if the question of the authority of the officers to bind the appellant, were open on this appeal, it may be observed that the contract of bailment being one which it was competent for the corporation to make, and having been made by its officers, acting within the scope of their general powers and apparent authority, and in the exercise of powers usually delegated to like officers, the bank would be estopped to deny their authority. It may be added further, that there was evidence from which the jury might properly have inferred, that the authority had been conferred upon the president and cashier,

and that their acts were known to and sanctioned by the directors. Union Bank v. Ridgely, 1 H. & G. 325, 413, 430.

But as we have before said, the question of the authority of the officers to act for the bank in the transaction is not before us. 29 Md. 2, Rule 4.

With respect to the several prayers of the appellee which were granted by the Circuit Court, and referred to in the bill of exceptions, we do not understand that any objection is made to them by the appellant, so far as they instructed the jury upon the question of the degree of care which the appellant's officers were bound by law to exercise in the custody of the appellee's bonds. In this respect they do not differ from the prayers granted at the instance of the appellant.

By the appellee's first prayer, the jury were instructed that the defendant would be responsible if the jury found from the evidence that the bonds had been stolen, "in consequence of the failure on the part of the defendant, to exercise such care and diligence in the custody or keeping of them as at the time, banks of common prudence in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of said property, and to have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant." No objection has been made, nor could any be justly urged against this proposition. The prayer further instructed the jury, that in determining whether or not such care and diligence were used, "the jury may take into consideration whether it was a proper precaution for the defendant to have had an inside watchman at night, and on Sundays, whether such watchman ought to have kept awake at night, and whether the bank ought ever to have been without an inside watchman at any part of the day on Sunday, and that they may take into consideration, the nature and value of said bonds, their liability to loss, the temptation they offered to theft, the difficulty of recovering them if stolen, the situation of the building and vault, and the sufficiency of the safe in which the defendant kept them at the time they were stolen."

Exception has been taken to the last part of the prayer, because of the enumeration of certain questions, as proper to be

considered by the jury, in determining whether such care and diligence had been used by the bank, as was defined in the prayer. But we find no error in this part of the instruction, the particular subjects of inquiry mentioned, were proper for the consideration of the jury; their province was not invalid, nor was there anything to mislead them, they were not told that in any of the particulars mentioned, the evidence showed a want of due and ordinary care on the part of the bank; and by the appellee's seventh prayer, they were instructed, "that it was a question to be determined by them from all the facts and circumstances in the case, whether there was or was not that degree of care and diligence used by the defendant, in the protection and preservation of the plaintiff's property which is defined in the plaintiff's first prayer."

The degree of care and diligence required by the law, was properly defined by the Circuit Court; the question whether it had been exercised by the defendant, was fairly submitted to the jury upon all the facts and circumstances of the case—this was a question of fact, exclusively within the province of the jury to decide; we have no power to disturb their verdict; and we have retrained from stating the facts and circumstances showing the manner in which the most extraordinary and unforeseen robbery was committed upon the bank. * * *

Judgment affirmed.

ANDERSON ET AL. v. CAROTHERS ET AL., 18 Wash. 520; 52 Pac. 229.

(1898)

DUNBAR, J. The appellants sued upon a promissory note. The respondents answered, denying the responsibility of the firm in the execution of the note, and set up certain facts constituting a counter-claim, to wit: that the defendants were indebted to them for a balance due upon a sale of sheep made by them to the defendants; that the defendants had given to the plaintiffs a bill of sale of 1900 head of sheep in August, 1893, said sheep then being at Trevor, Wisconsin; that the plaintiffs took possession of said sheep thereunder as security for the balance due them on the note; that the sheep were to be put on

the market and sold, and plaintiffs were to retain from the proceeds the amount of their claim and pay the balance to defendants; alleged negligence on the part of the plaintiffs in selling said sheep, failure to care for them properly while they were in the possession of the plaintiffs; that by reason of the carelessness, negligence and wrongful acts of the plaintiffs the sheep were not sold until the market had fallen, and the cost for their keeping had become very great; and that by reason of the negligence, carelessness and wrongdoing aforesaid, the defendants had been damaged in the sum of $4,000. It is urged by the appellants that the court erred in admitting in evidence in support of defendants' counter-claim the written agreement called the bill of sale. The ground of plaintiffs' objection was that the counter-claim did not state facts sufficient to constitute a cause of action. The real objection here must go to the pleadings, for if there was sufficient in the pleadings to constitute a cause of action the bill of sale could be introduced properly as evidence tending to support the allegations of the answer by showing the circumstances surrounding the parties when the contract was made, and the obligations of the plaintiffs under the pleadings. There was no demurrer to the affirmative answer, and an objection was virtually raised to the pleadings by the objection to the admission of this testimony. It would have been better practice, if the affirmative answer did not state sufficient to constitute a defense to the action, to have demurred to the same, but, considering the objection to the testimony, we do not think that the cases cited by the appellant sustain his contention. This is not the ordinary case of the pledgor and pledgee (after the pledgor's default) under an agreement that on such default the pledgee may sell the pledged property and pay himself out of the proceeds, under which circumstance it has sometimes been held that the pledgee is liable only for such willful default as will show an intent to injure or defraud the pledgor.

The first case cited by the appellant, Durant v. Einstein, 35 How. Pr. 223, is a case of this kind. This was a sale of stock which was placed in the hands of the pledgees as collateral security, below the market price, and there was no obligation on the part of the pledgee there to do anything but to sell the stock, but here the answer shows an entirely different case. The property pledged here was live stock, which required the

exercise of discretion in sustaining it; and every day that it remained unsold added an additional expense which destroyed its value, and, in addition to the allegations of the complaint that the sheep were not sold when they should have been sold, it is also alleged that they were not properly fed and cared for.

The citation from Jones on Pledges, § 735, while asserting the doctrine of the case just cited, concludes:

"It must appear that there was an intent to injure the pledgor, or that there was such recklessness shown, in the mode or time of selling, that such intent might be inferred."

We think the answer in this case alleges a state of facts from which this intent might be inferred.

In Whitin v. Paul, 13 R. I. 40, it was held that while the pledgee of certain promissory notes was not bound to forecast the market for the pledgor yet he was bound to use reasonable and ordinary diligence in realizing their value, but was not bound to exercise extraordinary care.

Schouler on Bailments and Carriers, in section 206, condenses the rule into the following expression.

"The true idea to be conveyed is, that the parties must be presumed to have contracted for applying the collateral in the manner which best consists with the rights of both," and the authorities amply sustain this announcement.

We think it plainly appears from the allegations of the answer in this case that the plaintiffs did not apply the collateral in the manner which best consisted with the rights of the defendants, which could have been done, without interfering with any rights of their own.

The second assignment, that the court erred in permitting the witness George Wright to testify over the objection of plaintiffs' counsel concerning the market price for sheep between the date of the agreement and September 13, 1893, falls within the objection just discussed.

Several errors are alleged in relation to the instructions of the jury, but the record discloses the fact that no exceptions were taken to the instructions given or to the refusal of the court to give instructions asked by the appellants. They will therefore not be considered by this court.

The judgment will be affirmed.[1]

[1] Stockholders liability.—Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162. Effect of failure of pledgee to exercise ordinary diligence.—Coleman v. Lewis, 183 Mass. 485: Scott v. First Nat. Bank, 68 L. R. A. 488.

3. Rights of Bailee (Pledgee)

DONALD v. SUCKLING, L. R. 1 Q. B. 585.

(1866)

Declaration. That the defendant detained from the plaintiff his securities for money, that is to say, four debentures of the British Slate Company, Limited, for £200 each, and the plaintiff claimed a return of the securities or their value, and £1000 for their detention.

Plea. That before the alleged detention, the plaintiff deposited the debentures with one J. A. Simpson, as security for the due payment at maturity of a bill of exchange, dated 25th August, 1864, payable six months after date, and drawn by the plaintiff, and accepted by T. Saunders, and endorsed by the plaintiff to and discounted by Simpson, and upon the agreement then come to between the plaintiff and Simpson, that Simpson should have full power to sell or otherwise dispose of the debentures if the bill was not paid when it became due. That the bill had not been paid by the plaintiff nor by any other person, but was dishonored; nor was it paid at the time of the said detention or at the commencement of this suit; and that before the alleged detention and the commencement of this suit, Simpson deposited the debentures with the defendant to be by him kept as a security for and until the repayment by Simpson to the defendant of certain sums of money advanced and lent by the defendant to Simpson upon the security of the debentures, and the defendant had and received the same for the purpose and on the terms aforesaid, which sums of money thence hitherto have been and remain wholly due and unpaid to the defendant; wherefore the defendant detained and still detains the debentures, which is the alleged detention.

Demurrer and joinder.

Shee, J.[1] (After stating the pleadings.) This plea sets up a right to detain the debentures, founded on a bailment of pawn by the plaintiff to Simpson, under which Simpson, if the bill should not be paid, had a right to sell the debentures, paying the overplus above the amount of the bill and charges to the plaintiff,—that is, to sell on the plaintiff's account and for his and

[1] Cf. with opinions of other judges.

Simpson's benefit,—and a repawn of them by Simpson as a security for a loan to him by the defendant.

It must be taken against the defendant, that the debentures were pledged to him by Simpson before the plaintiff had made default; it must be taken, too, that the advance for which the debentures were pledged to the defendant by Simpson was of a greater amount than the debt for which Simpson held them; it is consistent with the facts pleaded, either that it was repayable before or repayable after the maturity of the plaintiff's bill, and that the debentures were pledged by Simpson along with other securities, from which they could not at Simpson's pleasure, or on tender by the plaintiff of the sum for which they had been pledged to Simpson, be detached; and therefore that Simpson had put it out of his power to apply them by sale or otherwise to the only purpose for which possession of them had been given to him, viz., to secure the payment of his debt and the release of the plaintiff, by the sale of them, from liability on the bill which Simpson had discounted for him.

Whether this pledge to the defendant by Simpson was such a conversion by him of the debentures as destroyed his right of possession in them, and revested the plaintiff's right to the possession of them freed from the original bailment, is the question for our decision.

The contention that a pawnee is entitled to exercise over the chattel pawned to him a power so extensive as the one which this plea sets up, was before the case of Johnson v. Stear, if it be not now, wholly unsupported by authority.

A pawn is defined by Sir William Jones to be "a bailment of goods by a debtor to his creditor, to be kept by him till his debt is discharged"; and by Lord Holt to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor"; and by Lord Stair "a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own security, or in the case of not-payment of the debt, to sell the pledge and pay himself out of the price, and restore the rest, or restore the pledge itself on payment of the debt; all of which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispose in the case of not-payment"; and by Bell "a real right or jus in re, inferior to property, which vests in the holder a

power over the subject, to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledger or owner."

In the Roman civil law, as in our own law (see Pigot v. Cubley), the bailment of pawn implied what in this bailment is expressed, a mandate of sale on default of payment. Without it, or without, as in the Scotch and French law, a right to have a pledge sold judicially for payment on default made, the security by way of pledge would be of little value. The pawnee is said by Lord Coke, in his Commentaries on Littleton, to have a "property"; and in Southcote's case to have a "property in and not a custody only," of the chattel pawned; by which Lord Holt understands Lord Coke to mean a "special property," consisting in this, "that the pawn is a security to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him"; or in the words of Fleming, C. J., in Ratcliff v. Davis, "a special property in the goods to detain them for his (the pawnee's) security," that is, not a property properly so called, but the jus in re, that is, in re alienâ, of the Roman lawyers; the opposite, as Mr. Austin says, to property; but a right of possession against the true owner, and under a contract with him until his debt is paid, and a power of sale for the reciprocal benefit of the pawnee and pawnor on default of payment at the time agreed upon.

Mr. Justice Story says, that "the pawnee may by the common law deliver the pawn into the hands of a stranger without consideration, for safe custody, or convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his security, but that he cannot pledge it for a debt greater than his own; that if he do so he will be guilty of a breach of trust, by which his creditor will acquire no title beyond that of the pawnee; and that the only question which admits of controversy is, whether the creditor shall be entitled to retain the pledge until the original debt (that is, the debt due to the first pawnee) is discharged, or whether the owner may recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee." So much of this passage as is stated to be clear law, viz., that the pawnee may deliver the chattel pawned to a stranger for safe custody without consideration, or convey the same conditionally (i.e., it may be presumed, on the same conditions as those on which he

holds it), by way of pawn to another person for a debt not greater than his own, without destroying or invalidating his security, has no application to the case before us; inasmuch as the pawn by Simpson to the defendant was not for safe custody, nor without consideration, nor conditionally, nor for a debt not greater than the debt due by the plaintiff to Simpson, and because the power given to the pawnee by this bailment to dispose of the debentures by sale or otherwise, should his debt not be paid, might probably be considered, at least after default made, to enlarge the ordinary right of a pawnee over the chattel pawned. There is nothing in the passage which affords any countenance, except by way of query, to the position, that a pawnee, who, as in this case, has placed the chattel pawned out of the pawnor's power, and out of his own power to redeem it by payment of the amount for which it was given to him as a security, and who has deprived himself of the power of selling it for the payment of the pawnor's debt, can by so doing shield the creditor to whom he repawns it from an action of detinue at the suit of the real owner. Mr. Justice Story indeed says, "that if the pledgee voluntarily and by his own act places the pledge beyond his power to restore it, as by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of the pledge." It would be difficult to reconcile any other rule in respect of the pledging by pledgees of the chattels pawned to them with the well-established doctrine of our courts and the courts of the United States of America in respect of the pledging by factors of the goods entrusted to them. Factors, like pledgees, have a mandate of sale,—sale irrespectively of default of any kind is the object of the bailment to them; they have a special property and right of possession against all the world except their principal, and against him if they have made advances on the security of his goods entrusted to them; to give effect to that security they may avail themselves of their mandate of sale; but if they place the goods out of their own power by pledging them, although it be for a debt not exceeding their advances, the pawnee from them (except under the Factors Acts) is defenseless, in trover or in detinue, even to the extent of his loan, against the true owner.

Why it should be otherwise between the true owner and the pawnee from a pawnee of the true owner's goods, no reason

was adduced during the argument before us, nor indeed was it possible to adduce any reason, seeing that in all the decisions on pledges by factors the relation between a factor who has made advances on the goods entrusted to him and his principal has been held not distinguishable or barely distinguishable in its legal incidents from the relation between pawnee and pawnor; a factor being, as Mr. Justice Story says, "generally treated in juridical discussions as in the condition of a pledgee."

The case of Johnson v. Stear is a clear authority for holding, that Simpson, in dealing with the debentures in the way which he must be taken on this plea to have done, was, as the defendant also was, guilty of a conversion of them; and unless that case is also an authority binding upon us for the doctrine, that the conversion by a pawnee of the thing pawned is not such an abuse of the bailment of pawn as annuls it, but that there remains in him, and in an assignee from him, and in an assignee from his assignee, and so on toties quoties, without limit as to the number of assignments or the consideration for them, an interest of property in the pawn which defeats the owner's right of possession, the plaintiff is entitled to our judgment.

As I read the case of Johnson v. Stear, and the case of Chinery v. Viall, and Brierly v. Kendall, on the authority of which it proceeded, the judgments of the majority of the learned judges of the Court of Common Pleas, in the first of them, and the judgments of the Court of Exchequer, and of the Court of Queen's Bench, in the second and the third, are based on the principle that, in an action to recover damages for a conversion it is not an inflexible rule of law that the value of the goods converted is to be taken as the measure of damages; that when a suitor's real cause of action is a breach of contract he cannot by suing in tort entitle himself to a larger compensation than he could have recovered in an action in form ex contractu; and therefore that when a verdict is obtained against an unpaid vendor for the conversion of the thing sold by him, or against an unpaid pawnee for the conversion of the thing pledged to him, he is entitled to be credited, in the estimate by the jury of the damages to be paid by him, for the value of such interest or advantage as would have resulted to him from the contract of sale or the contract of pawn if it had been fulfilled by the vendee or pawnor. * * *

I think that the bailment to Simpson was determined by the pledge by him to the defendant under the circumstances stated in the plea; that both of them have been guilty of a conversion; that the plaintiff might, as Mr. Justice Williams said in the case of Johnson v. Stear, lawfully, should the opportunity offer, resume the possession of the debentures, and hold them freed from the bailment, and may, the defendant being remitted to his remedy against Simpson, and Simpson to his remedy upon the bill, recover them, or their full value, if they cannot be delivered to him, in this action of detinue.

MELLOR, J. (After stating the declaration and plea.) To this plea the plaintiff demurred, and upon demurrer, I think that we must assume that the pledging of the debentures by Simpson to the defendant took place before default was made by the plaintiff in payment of the bill of exchange at maturity, and that we must also assume that the money for which the debentures were pledged by Simpson, as a security to the defendant, was of larger amount than the amount of the bill of exchange discounted for the plaintiff by Simpson. The question thus raised by this plea is, whether a pawnee of debentures, deposited with him as a security for the due payment of money at a certain time, does, by repledging such debentures and depositing them with a third person as a security for a larger amount, before any default in payment by the pawnor, make void the contract upon which they were deposited with the pawnee, so as to vest in the pawnor an immediate right to the possession thereof, notwithstanding that the debt due by him to the original pawnee remains unpaid. If the affirmative of this proposition be maintained, the result seems prima facie to be disproportionate to any injury which the pawnor would be likely to sustain from the fact of his debentures having been repledged before default made. Still, if the principles of law, as laid down in decided cases, satisfactorily support the proposition above stated, this Court must give effect to them. There is a well recognized distinction between a lien and a pledge, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an agreement of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods, which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in

the case of a pledge or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. It is said by Mr. Justice Story that "the foundation of the distinction rests in this, that the contract of the pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." The question thus arises, is the right of retention in case of a lien, either by a custom or contract, otherwise different from a deposit, by way of pledge for securing the due payment of money, than in the incidental power of sale in the latter case on condition broken? In other words, on a contract of pledge, is it implied that the pledgee shall not part with the possession of the thing pledged until default in payment; and, if so, is that of the essence of the contract, so that the violation of it makes void the contract?

In the case of Legg v. Evans, an action of trover having been brought against the defendants, as sheriffs of Middlesex, to recover the value of some pictures and picture frames, the defendants justified under an execution against the goods and chattels of the plaintiff, to which the plaintiff replied setting up a lien in respect of work done upon such goods and chattels, which had been delivered to him in the way of his trade by one Williams, and further set up an agreement between the plaintiff and Williams, that the plaintiff should draw and endorse certain bills of exchange for the use of Williams, and should have a right to hold the said goods for securing the payment by Williams of the amount of the said bills of exchange; and he alleged that the said money and bills of exchange then remained wholly unpaid. The Court of Exchequer held, on demurrer to the replication, that it was a good answer to the plea; and Parke, B., is reported to have said: "If we consider the nature of a lien and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sher-

iff cannot sell an interest of this description, which is a personal interest in the goods"; and farther on he said, "Here the interest cannot be transferred to any other individual, it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant." In that case there was super-added to the lien in respect of work done an agreement that the person entitled to the lien should have a right to hold the said goods and chattels for securing the payment of the bills of exchange therein mentioned, and which then remained wholly unpaid. That case was treated as a simple case of lien or right "to hold," to secure the payment, not only of the amount due for work done on the goods by Williams, but also of the bills drawn and endorsed by him. It is, therefore, an authority to the effect that in the case of lien, even to secure the payment of money advanced, there is no implication of any power to sell or otherwise dispose of the subject-matter of the lien, because retention of possession by the party entitled to the lien is an essential ingredient in it.

It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the same object. In Pothonier v. Dawson, cited in argument in Legg v. Evans, Gibbs, C. J., said: "Undoubtedly, as a general proposition a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade."

It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words "special property," as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In Legg v. Evans the nature of a lien is defined to be a "personal right which cannot be parted with;" but "the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation." In each case the general property remains in the pawnor; but the question is, as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice

Story, in his Treatise on Bailments thus describes the right and interest of the pawnee: "He may, by the common law, deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee."

In M'Combie v. Davis it appeared that a broker had for a debt of his own pledged with the defendant certain tobacco of his principal's, upon which he had a lien, and in an action brought by the principal against the defendant in trover for the tobacco, Lord Ellenborough being of opinion "that the lien was personal and could not be transferred by the tortious act of the broker pledging the goods of his principal," the plaintiff obtained a verdict; and upon motion for a new trial Lord Ellenborough said that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods;" but he afterwards added "that he would have it fully understood that his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to pledge them as his own, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him."

It would, therefore, seem that in the case of a broker or factor for sale, before the Factors Acts, although he had no power to pledge his principal's goods, except to the extent of his own lien, with notice of the extent of his interest, yet where he pledged the goods on which he had a lien tortiously, neither

the factor nor his pawnee could retain them even for the payment of the amount of the original lien. The case of M'Combie v. Davies shows that the factor's or broker's lien, although simply a right to retain possession as between him and his principal, might be transferred and made a security to a third person, provided he professed to assign it only as a security to the like amount as that due to himself. Still the character of the transaction is that of lien, and not of deposit by way of pledge; and although the goods were entrusted to the broker for sale, and up to the time of sale remained in his hands upon a personal right to retain them for advances, yet he could not pledge them, and if he did, the act was an essential violation of the relation betwixt him and his principal, and entitled the latter at once to the recovery of the value of the goods in trover. "But the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee," as was said by the Court in Smart v. Sandars.

There would therefore appear to be some real difference in the incidents between a simple lien, like that in Legg v. Evans and the lien of a broker or factor before the Factors Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident, that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, "appointing him as his servant to keep possession for him." In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge, the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may

possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?

In Johnson v. Stear, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as security for the payment of an acceptance of the bankrupt for 621. 10s., discounted by the defendant, and which would become due January 29, 1863, and in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of trover, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner, in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th if he repaid the loan"; but the majority of the Court (Erle, C. J., Byles and Keating, JJ.) held that the plaintiff was only entitled to nominal damages, on the express ground, "that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created "an interest and a right of property in the goods, which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract." From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time,

and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." Although the dissent of that most learned judge diminishes the authority of that case as a decision on the point, and although it may be open to doubt whether in an action of trover the defendant ought not to have succeeded on the plea of not possessed, and whether the plaintiff's only remedy for damages was not by action on the contract, I am nevertheless of opinion that the substantial ground upon which the majority of the Court proceeded, viz. that the "act of the pawnee did not annihilate the contract, nor the interest of the pawnee in the goods," is the more consistent with the nature and incidents of a deposit by way of pledge. I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of lien, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a "vadium or pawn" in Coggs v. Bernard; although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrongdoer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place.

If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to

determine this case in favor of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the plaintiff; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he cannot successfully claim the immediate right to the possession of the debentures in question.

I am therefore of opinion that our judgment should be for the defendant.

BLACKBURN, J. [After stating the pleadings.] The plea does not expressly state whether the deposit with the defendant by Simpson was before or after the dishonor of the bill of exchange; and as against the defendant, in whose knowledge this matter lies, it must be taken that it was before the bill was dishonored, and consequently at a time when Simpson was not yet entitled by virtue of his agreement with the plaintiff to dispose of the debentures. We cannot construe the plea as stating that Simpson agreed to transfer to the defendant, as indorsee of the bill, the security which Simpson had over the debentures, and no more. We must, I think, as against the defendant, construe the plea as stating that Simpson deposited the debentures, professing to give a security on them for repayment of a debt of his own, which may or may not have exceeded the amount of the bill of exchange, but was certainly different from it. And it is quite clear that Simpson could not give the defendant any right to detain the debentures after the bill of exchange was satisfied, so that a replication that the plaintiff had paid, or was ready and willing to pay the bill, would have been good. The defendant could not in any view have a greater right than Simpson had. But there is no such replication; and so the question which is raised on this record, and it is a very important one, is, whether the plaintiff is entitled to recover in detinue the possession of the debentures, he neither having paid nor tendered the amount for which he had pledged them with Simpson. In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him; and if there still remain in Simpson, or in the defendant as his assignee, any interest in the goods, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the

defendant for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures.

The question, therefore, raised on the present demurrer is, whether the deposit by Simpson of the debentures with the defendant, as stated in the plea, put an end to that interest and right of detention till the bill of exchange was honored, which had been given to Simpson by the plaintiff's original contract of pledge with him.

There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention; and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established that, before the Factors Acts, a pledge by a factor gave his pledgee no right to retain the goods, even to the extent to which the factor was in advance, proceed on this ground. In Daubigny v. Duval, Buller, J., puts the case on the ground that, "a lien is a personal right and cannot be transferred to another." In M'Combie v. Davies, Lord Ellenborough puts the decision of the Court on the same ground, saying that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods." Story in his Treatise on Bailments, ss. 325, 326, and 327, is apparently dissatisfied with these decisions, thinking that a factor, who has made advances on the goods consigned to him, ought to be considered as having more than a mere personal right to detain the goods, and that a pledgee from him ought to have been considered entitled to detain the goods until the lien of the factor was discharged. This is a question which can never be raised in this country, for the legislature has intervened, and in all cases of pledges by agents, within the Factors Acts, the pledge is now available to the extent of the factor's interest.

But, on the facts stated on the plea, Simpson was not an agent within the meaning of the Factors Acts; and we have to consider whether the agreement stated to have been made between the plaintiff and him did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention. I think that both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee

power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing), does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of possession; but the right of hypothec is not recognized by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself: Howes v. Ball. I mention this because in the argument several authorities, which only go to show that a delivery of possession is, according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property.

The effect of the civil law is thus stated by Story, in his Treatise on Bailments, s. 328; "It enabled the pawnee to assign over, or to pledge the goods again, to the extent of his interest or lien on them; and in either case the transferee was entitled to hold the pawn, until the original owner discharged the debt for which it was pledged. But beyond this, the (second) pledge was inoperative and conveyed no title, according to the known maxim, nemo plus juris ad alium transferre potest quam ipse haberet."

In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. This was the very point decided by the Court in Mores v. Conham, where the Court say that the pawnee is responsible "if he misuseth the pawn; also he hath such interest in the pawn as he may assign over, and the assignee shall be subject to detinue if he detains it upon payment of the money by the owner." It is true that one judge, Foster, J., dissented on this very point. That may so far weaken the authority of the decision; but it shews that there could be no mistake in the reporter, and no oversight on the part of the majority, but that it was a deliberate decision.

It is laid down by Lord Holt in his celebrated judgment in Coggs v. Bernard, that a pawnee "has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him," language certainly seeming to indicate an opinion that he has an interest in the

thing, or real right, as distinguished from a mere personal right of detention. And Story in his Treatise on Bailments, s. 327, says: "But whatever doubt may be indulged as to the case of a factor, it has been decided," that is, in America, "that in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

In Whitaker on Lien, published in 1812, p. 140, the law is laid down to be, that the pawnee has a special property beyond a lien. I do not cite this as an authority of great weight, but as shewing that this was an existing opinion in England before Story wrote his treatise. But there is a class of cases in which a person having a limited interest in chattels, either as hirer or lessee of them, dealing tortiously with them, has been held to determine his special interest in the things, so that the owner may maintain trover as if that interest had never been created. But I think in all these cases the act done by the party having the limited interest was wholly inconsistent with the contract under which he had the limited interest; so that it must be taken from his doing it, that he had renounced the contract, which, as was said in Fenn v. Bittleston, operates as a disclaimer of a tenancy at common law, or as it is put by Williams, J., in Johnson v. Stear, he may be said to have violated an implied condition of the bailment. Such is the case where a hirer of goods, who is not to have more than the use of them, destroys them or sells them; that being so wholly at variance with the purpose for which he holds them, that it may well be said that he has renounced the contract by which he held them, and so waived and abandoned the limited right which he had under that contract. It may be a question whether it would not have been better if it had been originally determined that, even in such cases, the owner should bring a special action on the case, and recover the damage which he actually sustained, which may in such cases be very trifling, though it may be large, instead of holding that he might bring trover, and recover the whole value of the chattel without any allowance for the special property. But I am not prepared to dissent from these cases, where the act complained of is one wholly repugnant to the holding, as I think it will be found to have been in every one of the cases in which this doctrine has been acted upon. But where the act,

though unauthorized, is not so repugnant to the contract as to shew a disclaimer, the law is otherwise. Thus, where the hirer of a horse for two days to ride from Gravesend to Nettlested deviated from the straight way and rode elsewhere, it was held that the hirer had a good special property for the two days, and although he misbehaved by riding to another place than was intended, that was to be punished by an action on the case, and not by seizing the gelding: Lee v. Atkinson. This certainly was a much more equitable decision than if a rough rule had been laid down that every deviation from the right line, however small, was to operate as a forfeiture of the right to use the horse for which the hirer had paid; and it may be reconciled to the decisions already referred to, because the wrongful use, though wrongful, was not such as to shew a renunciation of the contract with the owner of the horse. Now, I think that the subpledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a subpledge; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to Mores v. Conham in our own law also) a regular incident in a pledge. If it is done too soon, or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it.

The cases of Bloxam v. Sanders and Milgate v. Kebble are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor, who irregularly sells the goods which have only been partially paid for, is very analogous to that of a pledgee; and in Milgate v. Kebble, Tindall, C. J., is reported to have used language that seems to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.

But the latest case, and one which I think is binding on this Court, is that of Johnson v. Stear; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority, that at all events there remains in the pawnee an interest, not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue. In that case the goods had been pledged as a security for a bill of exchange, with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the day before he had a right to do so. The assignees of the bankrupt pledgor brought trover, and sought to recover the full value of the goods without any reduction. Williams, J., thought that they were so entitled, giving as his reason, "that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." And if this was correct, the present plaintiff is entitled to judgment. But the majority of the Court decided that "the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under that contract." This can be reconciled with the cases above cited, of which Fenn v. Bittleston is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of Johnson v. Stear. It may be that the conclusion from these premises ought to have been, that

the defendant was entitled to the verdict, on the plea of not possessed in trover, unless the Court thought fit to let the plaintiff, on proper terms, amend by substituting a count for the improper sale; but this point as to the pleading does not seem to have been presented to the Court of Common Pleas. The fact that they differed from Williams, J., shews that after consideration they meant to decide, that the pledge gave a special property, which still continued; and though I have the highest respect for the authority of Williams, J., I think we must, in a court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground. And as already intimated, I think that unless the plaintiff is entitled to the uncontrolled possession of the things, he cannot recover in detinue.

For these reasons, I think we should give judgment for the defendant.

MELLOR, J., read the judgment of

COCKBURN, C. J. The question in this case is, whether, when debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositee to sell or otherwise dispose of the debentures in the event of nonpayment of the bill,—in other words, as a pledge,—and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and without either paying or tendering the amount of the bill of exchange, for the payment of which the security had been pledged, bring an action of detinue to recover the thing pledged from the holder to whom it has been transferred.

I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which

the pledge was given. In some instances it may well be inferred from the nature of the thing pledged,—as in the case of a valuable work of art,—that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers. It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, —for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him or tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end, until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him.

The view which I have taken of this case, and which I should have arrived at independently of authority, is fully borne out by the decision of the majority of the Court of Common Pleas

in the case of Johnson v. Stear. There, goods, which had been pledged as security for the payment of a bill of exchange, having been sold before the falling due of the bill, the Court held, on an action of trover being brought to recover the goods, that, although the owner was entitled to maintain an action against the pawnee for a breach of contract in parting with the goods, yet that the contract itself was not put an end to by the tortious dealing with the goods by the pawnee, so as to entitle the owner to bring an action to recover the goods as if the contract never had existed. This decision appears to me to be a direct authority on the present case, and to be binding upon us. It is true that Mr. Justice Williams dissented from the other three judges constituting the court, holding that the contract was put an end to, and the plaintiff remitted to his absolute right of ownership by the conversion of the goods by the pawnee. But however I may regret to differ from that very learned judge, I concur, for the reasons I have given, with the majority of the Court of Common Pleas in holding, that a pawnor cannot recover back goods (and the same principle obviously would apply to debentures) pledged as security for the payment of a debt or bill of exchange, until he has paid or tendered the amount of the debt.

I am therefore of opinion that our judgment should be in favor of the defendant.

Judgment for the defendant.[1]

[1] The decision in this case was followed in the case of Halliday v. Holgate, L. R. 3 Ex. 299 (1868). In the latter case a man who later became bankrupt borrowed from defendant a sum of money on his own promissory note, payable on demand, and deposited as security certain scrip certificates for shares. He became bankrupt, and the defendant sold, without demand and without notice, enough of the shares to pay his debt. The assignee in bankruptcy sued for conversion but the court of Exchequer Chamber affirmed the decision of the Court of Exchequer that he was not entitled even to nominal damages. "It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest." 21 Eng. Rul. Cas. 334-336 Notes.

On the other hand it has been held that a wrongful sale or repledge of the goods for a larger amount than the original debt, of itself terminates the lien, and entitles the pledgor to maintain an action of conversion for the goods without a tender of the debt. Feige v. Burt, 118 Mich. 243; Waring v. Gaskill, 95 Ga. 731; Richardson v. Ashby, 132 Mo. 238; 9 Harv. L. Rev. 289, 540; 11 Harv. L. Rev. 201; 13 Harv. L. Rev. 55.

MOORE v. THE METROPOLITAN NATIONAL BANK,

55 N. Y. 41.

(1873)

Appeal from judgment of the General Term of the Syracuse Court in the third judicial department, affirming a judgment in favor of defendant, The Metropolitan Bank, entered upon an order dismissing the complaint as to it, upon trial of issues of fact settled herein to be tried by a jury.

This action was brought to restrain defendants from disposing of and to recover possession of a certificate of indebtedness of the State of New York for $10,000, issued by the new capitol commissioners under chapter 830 of the Laws of 1868. Issues were settled and directed to be tried by a jury.

It appeared, upon the trial, that the certificate in question was delivered by plaintiff to defendant Miller with an assignment thereon, as follows:

"$10,000.

"For value received, I hereby transfer, assign and set over to Isaac Miller the within described amount, say ten thousand dollars.

"LEVI MOORE."

This assignment and delivery was induced by false representations upon the part of Miller as to his responsibility. Miller applied to plaintiff for a loan of $7,000, and relying upon such representations the latter delivered to him[1] the certificates so assigned receiving therefor two notes amounting to $7,000 and Miller's check for $3,000, and under the agreement that Miller should get the certificate cashed in New York, paying the $3,000 out of the proceeds. In case it was not cashed in three weeks, the certificate was to be returned and the check and notes taken up. The certificate was not cashed in three weeks. Upon the trial before the jury, plaintiff introduced in evidence the certificate with said assignment thereon, and also a similar assignment from Miller to defendant, The Metropolitan National Bank, dated November 22, 1868.

GROVER, J. * * * That question is, whether the bank, having in good faith taken a transfer of the certificate from

[1] Voidable sale: not a pledge.

Miller as security for his note, given to it at the time for money then loaned by the bank to him, acquired a title to the certificate, valid as against the plaintiff, as security for the money so loaned. It is clear that it acquired nothing more, as against the plaintiff or Miller. Upon repayment of the money loaned, and interest, the bank would be bound to retransfer the certificate to the party entitled, which the judgment given in the action between the plaintiff and Miller shows to be the plaintiff. The bank cannot make title to the certificate upon the ground that Miller had authority from the plaintiff to sell it, as his agent in New York, for the reason that the case shows that, unless he effected a sale there within three weeks from the time he received the certificate from the plaintiff, he was to return the same to him, and receive back from him the notes and his check given by him to the plaintiff therefor, and that the bank did not obtain the certificate from Miller until after the expiration of the three weeks. Had the plaintiff authorized Miller to sell the check, as his agent, this would not confer authority to pledge it as security for a loan of money from the bank. Besides, the case fails to show that Miller was to sell the certificate, as agent for the plaintiff, but it does show that he purchased the same from him, giving notes and his check therefor, coupled with an agreement that, if he failed to get it cashed in New York in three weeks, he should return it to the plaintiff, and receive back the notes and check. This did not constitute Miller the agent of the plaintiff. If he got the certificate cashed, it was for himself, and the money received therefor would have been his, and not that of the plaintiff. The case further shows that the plaintiff executed an absolute transfer of the certificate written thereon to Miller, and delivered the same to him. It further shows that Miller, in making the purchase, practiced such a fraud upon the plaintiff as would authorize him to rescind the contract, as to him, and that he did, upon the discovery of such fraud, elect to rescind the same. The question is thus presented whether a bona fide purchaser of a chose in action, not negotiable, from one to whom the owner has transferred the apparent absolute ownership, upon the faith of such ownership obtains a valid title as against such owner, although his vendor had not such title. The counsel for the plaintiff insists that this precise question was decided against the title acquired by such purchaser, by this court, in Bush v.

Lathrop (22 N. Y. 535), where it was held that equities existing between the assignor and the assignee of a chose in action, not negotiable, attend the title transferred to a subsequent assignee for value, without notice,—that the latter takes the exact position of his vendor. The counsel for the bank, to sustain its title, cites McNiel v. The Tenth National Bank (46 N. Y. 325). In this it was held that, where the owner of corporate stocks conferred upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has acquired title in good faith from such apparent owner. It is obvious that both these cases cannot be upheld, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation and choses in action not negotiable. The Commercial Bank of Buffalo v. Kortwright (22 Wend. 348) involved the same question as the latter, which was decided the same way by the Court for the Correction of Errors. Further discussion of the principle upon which the decisions in these cases were based, or citation of the authorities sustaining it, is unnecessary. That work has been well done by the able judges who delivered the opinions therein. The counsel for the plaintiff concedes that the rule is the same in regard to goods and chattels. A citation of the numerous authorities sustaining this position is therefore, unnecessary. Yet it is beyond question that the general rule is that a purchaser of corporate shares, or of goods and chattels acquires only such title as the vendor had thereto. Ballad v. Burgett (40 N. Y. 314) was decided upon this ground. One reason why an owner of corporate shares or of goods and chattels, who has conferred upon another the apparent ownership, without transferring to him a valid title, was held precluded from asserting his title, against a bona fide purchaser from such apparent owner, is that such purchase was made upon the faith of the title which he had apparently given, and that it would be contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the indicia of ownership and power of disposition. Another reason was, that were the rule otherwise, it would afford opportunities for the perpetration of frauds upon the purchasers from such

apparent owners. Where one, known to be the owner of shares or chattels, delivers to another the scrip or possession of the chattels, together with an absolute written transfer of all his title thereto, he thereby enables him to hold himself out as owner, and, as such, obtain credit upon and make sales of the property; and if, after he had so done, the owner was permitted to come in and assert his title against those dealing upon the faith of these appearances, the dishonest might combine and practice the grossest frauds. Another reason is that it presents a proper case for the application of the legal maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed. All these reasons, it is obvious, apply with all their force to choses in action. Why should the owner of a horse or of bank shares, who has given to another an absolute written transfer of all his right thereto for some purpose other than that of passing the title, be precluded, as against a bona fide purchaser from such person, from asserting his title, while, under the same state of facts, he may reclaim from such purchaser a bond and mortgage or a certificate of indebtedness like the one in question? As to the former he is estopped, while as to the latter the same state of facts, it is insisted, will work no such result. The counsel for the plaintiff insists that such distinction should be made, for the reason that the purchaser of corporate shares and chattels from the apparent owner obtains a legal title which is valid and may be asserted in a court of law, while the assignee of a chose in action, not negotiable at common law, obtained an equitable title only; and that the equity of the former owner, being prior in time to that acquired by the purchaser, is superior thereto, the rule in equity being that, where the equities are equal, the first in time shall prevail; but upon what ground the same state of facts that will estop a party from the assertion of a legal title will not also estop him from the assertion of an equitable one the counsel fails to show, for the very good reason that no such ground exists. It is so obvious that the estoppel should, upon principle, apply to the latter equally with the former, that a distinction can only be justified upon authority.

The counsel further insists that to apply the same rule to non-negotiable choses in action will, in effect, make them negotiable. Not at all. No one pretends but that the purchaser will take the former subject to all defenses, valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital and not at all affected by the application of the same rule as to chattels. * * * Bush v. Lathrop was decided by a majority of the court, three of the judges dissenting. Some of the majority may have concurred upon the ground of notice to the purchaser; but whether so or not, I think McNeil v. The Tenth National Bank (supra) identical in principle with the present, much better considered, and that its principle should control. It follows that the bank, if it made the loan in good faith to Miller, upon the credit of the certificate, acquired a title thereto valid against the plaintiff to the extent of the loan. From the papers it appears that the certificate, at the time amounted to something more than the loan to Miller by the bank. This excess belongs to the plaintiff. Cases where Bush v. Lathrop was referred to, in the opinions delivered in this court, with apparent approbation were cited by the counsel; but in none of them was the question in the present involved. In that several legal propositions were stated with perfect accuracy. It was in reference to these that the case has been so referred to, without at all considering the present question. I think the recital in the assignment from Miller to the bank, that it was for value received, was not evidence in favor of the bank against the plaintiff, of the payment or loan of the money to him; that the introduction of the assignment by the plaintiff, for the purpose of showing what claim the bank made, or for any other purpose, did not make it so.

The judgment in favor of the bank must be reversed and new trial ordered, costs of the appeal to abide the final judgment for costs in the cause.

All concur, except Allen and Folger, J., who concur in the result, on the ground of the mistrial; but Allen, J., dissents from the opinion, as to rights of a bona fide purchaser, and Folger, J., does not vote thereon.

Judgment reversed.

TALTY v. FREEDMAN'S SAVINGS AND TRUST COMPANY, 93 U. S. 321.

(1876)

Error to the Supreme Court of the District of Columbia.

This was replevin by the plaintiff to recover a collateral security pledged to one Kendig, a broker, and by him sold to the defendant. Under the instructions of the court below, the jury found a verdict for the defendant; judgment was rendered thereon, and the plaintiff sued out this writ of error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Talty had a claim against the city of Washington for work and materials, amounting to $6,096.75. He submitted it to the proper authority, and received the usual voucher. On the 4th of January, 1872, the claim was approved by the commissioners of audit, and a certificate to that effect was given to him. On the 6th of that month he employed Kendig, a broker, to negotiate a loan for him. With that view he placed in Kendig's hands his own note for $3,000, having sixty days to run, with interest at the rate of ten per cent per annum, payable to his own order, and indorsed by him in blank. He also placed in the hands of Kendig, to be used as collateral, his claim against the city, indorsed in blank also. The same day Kendig negotiated the loan and paid Talty the amount of the note less the discount. Kendig sold the claim against the city to the defendant for ninety-six cents on the dollar. The money was paid to him. The purchase was made in good faith, and without notice of any right or claim on the part of Talty. With the proceeds of this sale Kendig took up the note. A few days before its maturity, Talty called on Kendig and offered to pay the note, and demanded back the collateral. Kendig declined to accede to the proposition. He insisted that the understanding between him and Talty was that he was to receive no commission for negotiating the loan, but that he was to have instead the right to sell or take the claim against the city, if he chose to do so, at ninety cents on the dollar. He offered to pay Talty for the claim, making the computation at that rate, and deducting the amount of the note. This Talty refused, and insisted that Kendig had no authority with respect to the claim but to sell, in the event of default in the

payment of the note, at maturity. Each party testified accordingly. Subsequently, and after the maturity of the note, Talty demanded from the defendant in error the vouchers relating to the claim. The defendant refused to give them up, and this suit was thereupon instituted. The marshal took them under the writ of replevin, and delivered them to the plaintiff.

No tender was made by Talty to the defendant in error, nor to Kendig, and nothing was said by him upon the subject of paying his note to either, except the offer of Kendig, as before stated.

After receiving back the collateral, Talty was paid the full amount of it by the commissioners of the sinking fund of the city. The only dispute between the parties as to the facts was that in relation to the authority of Kendig touching the claim.

Upon this state of the evidence the court instructed the jury to find for the defendant, and to assess the damages at the value of the claim. This was done, and judgment was entered upon the verdict. The instruction was excepted to.

Before entering upon the examination of the merits of the controversy, it may be well to consider for a moment the situation of the several parties. Talty has received and holds the proceeds of his note and the full amount of the collateral. Kendig holds the note and the amount of the collateral, less four per cent. The defendant in error, the bona fide purchaser of the claim, is out of pocket the amount paid for it to Kendig, and has the burden of this litigation and the security afforded by the replevin bond of Talty.

The question to be determined is, whether a tender to the defendant in error by Talty of the amount due on his note before bringing this suit was indispensable to entitle him to recover.

Kendig was not a factor with a mere lien. He was a pledgee. The collateral was placed in his hands to secure the payment of the note. It was admitted by Talty that Kendig was authorized to sell it if the note were not paid at maturity. Kendig had a special property in the collateral. He was a pawnee for the purpose of the pledge. Judge Story says (Bailm. sects. 324-327), "The pawnee may by the common law deliver over the pawn to a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his se-

curity. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee."

"Whatever doubt may be indulged in, in the case of a mere factor, it has been decided, in the case of a strict pledge, that, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

Numerous authorities are cited in support of these propositions. The subject as to the point last mentioned was learnedly examined in Jarvis's Adm. v. Rodgers, 15 Mass. 369. That was the case of a repledge by the first pledgee. The rule of the text as to the rights of the sub-pledgee was distinctly affirmed.

The case of Lewis v. Mott, 36 N. Y. 395, was in some of its leading points strikingly like the case before us. There, Brown had placed certain collaterals in the hands of Howe to secure the payment of two promissory notes of Brown held by Howe; Howe sold the notes and collaterals to Varnum; Brown offered to pay Varnum the amount of the notes, and demanded the collaterals; Varnum refused to give them up, and Brown sued for them. The court said, "It must be conceded that Varnum, by the purchase of those securities from Howe, acquired the lien and interest of Howe, whatever that may have been; and the plaintiff's assignee, to have entitled himself to a re-delivery of these securities, must have tendered the amount of the lien. There was simply an offer to pay Varnum the amount due upon these notes. It was unattended with any tender of the amount due, and was insufficient to extinguish the lien and thus entitle Brown to the return of the notes. * * * The offer to pay is not the equivalent for an actual tender. Bateman v. Pool, 15 Wend. 637; Strong v. Black, 46 Barb. 222; Edmonson v. McLeod, 16 N. Y. 543." See also Baldwin v. Ely, 9 How. 580; Merchants' Bank v. The State Bank, 10 Wall. 604.

The English law is the same. In Donald v. Suckling, Law Rep. 1 Q. B. 585, the case was this: A. deposited debentures with B. as security for the payment of a bill indorsed by A. and discounted by B. It was agreed, that, if the bill was not paid

when due, B. might sell or otherwise dispose of the debentures. Before the maturity of the bill, B. deposited the debentures with C., to be held as security for a loan by him to B. larger than the amount of the bill. The bill was dishonored, and, while it was unpaid, A. sued C. in detinue for the debentures. It was held that A. could not maintain the suit without having paid or tendered to C. the amount of the bill. The case was elaborately considered by the court. See also Moore v. Conham, Owen, 123; Ratcliffe v. Davis, Yelv. 178; Johnson v. Cumming, Scott's C. B. n. s. 331.

A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes ipso facto the title of the second pledgee; but that there can be no recovery against him without tender of payment is equally well settled. Donald v. Suckling, supra; Jarvis's Adm. v. Rodgers, supra; s. c. 13 Mass. 105.

But it is suggested that the note was in the hands of Kendig, and that Talty could not, therefore, safely pay the amount due upon it to the holder of the collateral. The like fact existed in Donald v. Suckling. It is not adverted to in the arguments of counsel, nor in the opinions of the judges in that case. It could not, therefore, have been regarded by either as of any significance. The answer here to the objection is obvious. The note, a few days before its maturity, was in the hands of Kendig. There being no proof to the contrary, it is to be presumed to have remained there. This suit was commenced after it matured. Talty might then have paid the amount due upon it to the defendant in error, and could thereupon have defended successfully in a suit on the note, whether brought by Kendig or any indorsee taking it after due. He might also, after making the tender, have filed his bill in equity, making Kendig and the savings-bank defendants, and thus have settled the rights of all the parties in that litigation. Having sued at law without making the tender, it is clear he was not entitled to recover.

The instruction given by the court to the jury was, therefore, correct.

The proceeding and judgment were according to the local law regulating the action of replevin in the District of Columbia.

In the discussion here our attention was called only to the question of tender; nothing was said as to the rule of damages laid down by the court below.

There is another question, arising upon the record, and that is, whether the defendant in error, being a bona fide purchaser, did not, under the circumstances, acquire the absolute ownership of the claim. Story on Agency, sect. 127; Addis v. Baker, 2 Anst. 229; McNeil v. The Tenth National Bank, 46 N. Y. 325; Fatman v. Lobach, 1 Duer, 524; Weirick v. The Mahoning County Bank, 16 Ohio, 297; Fullerton v. Sturgess, 4 Ohio St. 529.

But as the point has not been argued, we express no opinion upon the subject.

Judgment affirmed.

BROWN v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968.

(1899)

The court, Johnson, J., found in favor of plaintiff for the sum of $2,027, and interest, and from an order denying a motion for a new trial, defendant appealed.

MITCHELL, J.

This action was brought to recover on a life insurance policy which had been paid at its maturity to the Security Bank of Minneapolis; the plaintiff claiming that he was the owner of the policy, and that the defendant had no right to pay the money to the bank. The action was tried by the court, which ordered judgment for the plaintiff for the face of the policy. All the assignments of error challenge the sufficiency of the findings of fact to support the conclusions of law. Omitting immaterial matters, and stating the findings according to their legal effect, they are substantially as follows:

On April 6, 1872, the defendant issued to the plaintiff a policy on his life for $2,000, payable to himself in twenty years, or, in case of his death before that date, to his personal representatives or assigns. On March 16, 1881, the plaintiff assigned the

policy to one Hadley. This assignment, which was indorsed on the policy, was absolute in form, but was made in fact merely as indemnity or security to Hadley for a loan of $1,000, which he agreed shortly to procure for the plaintiff, but which he failed to do; so that the consideration for the assignment wholly failed, and hence, as between plaintiff and Hadley, the former was the owner of the policy, and the latter had no interest in it. Hadley, however, remained in possession of the policy until May '23, 1887, when he assigned and delivered it to the Security Bank of Minnesota as security for money loaned by it to him, and which he has never repaid. * * *

They took the assignment from Hadley "for a valuable consideration, without any notice or knowledge of any claim on the part of said Cyrus L. Brown or his wife to said policy, and without any knowledge or notice of any rights or equities existing between said Brown or his said wife and said Hadley in any manner relating to said policy"; nor did they ever acquire any such notice or knowledge prior to the date of the payment of the policy at its maturity.

The policy, with the two assignments, remained in the possession of the bank until the policy matured, in 1892, when the defendant paid the amount due on it to the bank, after taking from it a bond of indemnity against the claims of any other persons. Plaintiff had paid the premiums on the policy up to the time he assigned it to Hadley, in March, 1881; and thereafter up to the time it matured, in 1892, the premiums (the amounts of which are found by the court) were paid by Hadley, and have never been repaid to him by plaintiff. In March, 1884, plaintiff notified the defendant not to pay any money on the policy to Hadley, or to any one else except himself, and that Hadley had no right to or interest in the policy; but there is no finding that plaintiff ever took any active measures to secure a return of the policy from Hadley. He never knew that Hadley had assigned it to the bank until after the defendant had paid it to the bank. Neither the bank nor Hadley had any insurable interest in the life of the plaintiff.

The defendant's defense is that it has paid the amount of the policy to the party entitled to it, to wit, the bank; and it bases the bank's right to the money on two legal propositions, viz.: (1) That the policy was assignable to any one, although not

having any insurable interest in the life of the insured; and (2) although, as between plaintiff and Hadley, the former owned the policy, yet the plaintiff by his conduct in clothing Hadley with all the indicia of ownership, is estopped to assert his own rights as against the bank, an innocent purchaser for value. The plaintiff takes issue with the defendant on both propositions.

In view of the conclusion at which we have arrived upon the second proposition, it becomes unnecessary to consider the first, although we remark in passing that we have not discovered anything which has changed the impression as to the state of the authorities on the question which we expressed (obiter, it is true) in Hogue v. Minn. P. & P. Co., 59 Minn. 39, 60 N. W. 812.

We do not, however, place our decision of the second proposition upon the ground advanced by counsel for the plaintiff, which is, in substance, that estoppels must be mutual and reciprocal; that only parties to the suit and their privies, can take advantage of an estoppel existing as between themselves; and that an estoppel available only to a stranger to the action will not avail either of the parties; hence, even if an estoppel existed in favor of the bank against the plaintiff, this is not available to the defendant. This is a misapplication of a very familar and well-settled rule of law. If the defendant had paid the amount of the policy to the party who, as between plaintiff and the bank, was entitled to it, that was a perfect defense to the action. The issue before the court was who was entitled to the money,—plaintiff or the bank; and for this purpose it was competent for the defendant to establish the right of the bank as against plaintiff, whether that right was based upon equitable estoppel or upon contract.

We, however, place our decision upon the ground that, this policy being a mere non-negotiable chose in action, the bank occupies the exact position of its assignor, Hadley, and took it subject to the equities existing between him and his assignor, the plaintiff, unless the latter is equitably estopped by his conduct from asserting those equities against the bank, and that there are no facts in this case which create any such estoppel.

Upon the facts found, the defendant has nothing upon which to base an equitable estoppel, except the bare fact that plaintiff delivered possession of the policy to Hadley, accompanied by an absolute assignment, without any expressed conditions or limitations, and thereby clothed him with the indicia of absolute own-

ership. The bank officers relied upon, and based their belief in Hadley's ownership upon, their examination of the policy and the assignment without knowing, and presumably without attempting to ascertain, how or for what purpose the assignment to Hadley was made, or what the consideration for it was. If it be said that plaintiff was negligent in not taking active measures to secure a return of the policy from Hadley, and in not personally paying the premiums on his own policy, the answer is that, if so, such negligence did not constitute any breach of duty, either legal or moral, towards the bank, or any one else who might see fit to deal with the policy. The doctrine that the assignee of a non-negotiable chose in action takes it subject to all existing equities and defenses is not confined to equities or to defenses existing in favor of the debtor or obligor who executed the chose in action, but it also applies to cases where the chose in action has gone through successive assignments to the second and subsequent assignees, if there were equities subsisting between the original assignor, or any other assignor, and his immediate assignee, in favor of the former.

What is called the doctrine of "latent equities" has received some judicial support. This means that in a case like the present the equities of plaintiff, the original assignor, are latent, and cannot prevail against the title of the bank, the second assignee; that the only defenses subject to which the assignee of a non-negotiable chose in action purchases are those existing in favor of the debtor who issued the obligation or security. This doctrine has been generally condemned as unsound and tending to extend the peculiar qualities of negotiable paper to things in action not negotiable, and to destroy the fundamental distinction between negotiable and non-negotiable demands. For a full discussion of this whole subject, see 1 Pomeroy, Eq. Jur. §707, et seq.; Pomeroy, Code Rem. §154, et seq.; also Bush v. Lathrop, 22 N. Y. 535.

The leading case in favor of the doctrine of "latent equities" is Moore v. Metropolitan, 55 N. Y. 41, which squarely overrules Bush v. Lathrop, supra; saying that it and McNeil v. Tenth, 46 N. Y. 325, cannot both stand, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation, and choses in action not negotiable, and then concluded that there is no distinction., But, as Mr. Pomeroy clearly points out, the court in Moore v. Metropolitan do not make the slightest allusion to the narrow limits placed in McNeil v. Tenth

upon the use of the estoppel, viz. to cases in which the assignor, by a written instrument over his signature, confers, not only the apparent title, but the unconditional power of disposition over the security. But the most important distinction between the two cases lies in the fact that in the McNeil case the subject of the assignment was not a mere non-negotiable chose in action, but certificates of corporate stock, which are universally dealt in by business men as if they were in all respects negotiable, and are transferred from hand to hand by a blank assignment accompanied by a power of attorney giving the holder full power of disposition according to the usual course of dealing with like securities. The decision is but another instance of the manner in which business usages are adopted and incorporated into the law by the progressive course of judicial legislation.

But no such considerations exist in the case of an ordinary chose in action, like a life insurance policy, which is not only non-negotiable in fact, but is so considered and treated by business men. And if, in the case of an ordinary non-negotiable chose in action, the effect of an estoppel be produced against an assignor from a mere assignment, absolute on its face, executed by the owner and delivered to his assignee, it is but an easy step, as Mr. Pomeroy suggests, to extend the doctrine of equitable estoppel to the debtor or obligor himself because he has issued an undertaking which creates an apparent liability against himself.

Our conclusion is that there was no estoppel against the plaintiff in favor of the bank. But, notwithstanding this, and that the consideration for the assignment from plaintiff to Hadley failed, and even conceding that the assignment was invalid, still Hadley had a lien upon the policy for the amount paid by him for premiums. The assignment from him to the bank transferred to it all his interests in the policy, which was the amount of the premiums advanced by him. To that amount the bank was entitled to the money on the policy, and to that extent the defendant rightfully paid the money to the bank; and this constituted a defense, pro tanto, to this action. Therefore, according to the findings, the court ought to have deducted from the face of the policy the amount of the premiums paid by Hadley, wth interest, and ordered judgment against the defendant only for the balance.

The cause is remanded, with directions to the court below to modify its conclusions of law and order for judgment in accordance with this opinion.

START, C. J. (dissenting).

I dissent. The statute makes all choses in action which were not negotiable by the law merchant so far negotiable that the legal title thereto may be transferred by an assignment thereof, subject to any defense thereto, legal or equitable, that the maker may have. Therefore there is, in legal effect, written upon all non-negotiable paper, these words: "This instrument is assignable, subject to any defense which the maker may have to it." Now, to conclude, from the fact that the maker of such an instrument is not estopped, because he has issued an undertaking creating an apparent liability against himself, that the payee, who has clothed his assignee with the apparent absolute title thereto, is not equitably estopped from asserting any latent equities as to such title against a bona fide purchaser, is to reason from false premises, because in the former case the proposed purchaser is admonished by the law that, if he buys, he does so subject to any equities the maker may have, but in the latter he is advised that the payee may transfer the absolute legal title by an assignment.

Equally unsound, it seems to me, is the claim that to apply the doctrine of equitable estoppel as between the payee of a non-negotiable instrument and a bona fide purchaser who parted with his money in reliance upon an absolute assignment of the paper, makes the paper, in effect, negotiable. The application of the doctrine in such a case does not affect the negotiability of the instrument, or give to it any rights other than such as the statute gives, for it is still subject to all defenses valid as to the original parties. In this case the plaintiff conferred upon his assignee the apparent absolute legal title to, and ownership of, the insurance policy, and permitted him to retain it and pay the premiums for ten years, and then, after the bank had honestly parted with its money in reliance upon such apparent ownership, he seeks to assert a latent equity existing between him and his assignee as to the title. Upon the plainest principles of justice he ought to be estopped from asserting his equities to the prejudice of the purchaser, and such seems to be the law. Moore

v. Metropolitan, 55 N. Y. 41; Bigelow, Estop. 562; Colebrooke, Coll. Sec. §§ 436, 439; Jones, Pledges, § 466.

COLLINS, J. (dissenting).

I agree with Chief Justice START in his dissenting opinion.

The appellant having petitioned for a re-argument, the court granted the petition. * * *

PER CURIAM.

After receiving and considering the additional arguments of counsel, Justices MITCHELL and BUCK adhere to the views expressed and the result reached in the opinion of the court heretofore filed, while Chief Justice START and Justice COLLINS adhere to the views expressed in their dissent, and are in favor of reversal, on the grounds therein stated. Justice CANTY, while still adhering fully to the position taken in the original opinion of the court upon the so-called doctrine of latent equities, is of opinion that the plaintiff, by reason of his conduct in allowing the policy, accompanied by an assignment absolute in form, to remain for 11 years in the possession of Hadley without taking any active measures to recover it, and in neglecting during all that time to pay the premiums necessary to keep it alive, is estopped by his laches and abandonment from now asserting any rights to or under the policy, or attempting to avail himself of its benefits which have been preserved by the expenditures of another. While Chief Justice Start and Justice Collins are in favor of a reversal on the broader ground already stated, they also concur in the view of Justice Canty, that the case should be reversed on the ground that plaintiff is equitably estopped by his laches and abandonment from claiming the proceeds of the policy. The court is unanimously of opinion that the policy, being valid in its inception, was assignable to any one.

It follows that the opinion of the court, either unanimously or by a majority, is that:

1. The policy was assignable by plaintiff to Hadley, and by Hadley to the Security Bank.

2. The assignment from Hadley to the Security Bank would be subject to the equities of the plaintiff, in the absence of facts creating an equitable estoppel against him; and the mere fact that the assignment from plaintiff to Hadley was absolute in form would not create such an estoppel.

3. But the laches of plaintiff, and his practical abandonment of the policy by neglecting for 11 years to take active measures to recover possession of it, or to keep it alive by paying the premiums on it, but allowing it to lapse unless Hadley saw fit to pay the premiums at his own expense, would estop him from now claiming any rights under or benefits from the policy, as against Hadley or the bank.

If the findings of the trial court on the latter point were clear and positive there would be nothing to do but to order judgment for the defendant. But it is not clear from the findings, especially in view of the latter part of the so-called fifteenth finding, how far they were intended to go, or what was the precise ground upon which the court ordered judgment for the plaintiff. Therefore, under the circumstances, we are of opinion that the proper disposition of the appeal is to reverse, and order a new trial of the cause in accordance with this opinion. It is so ordered.

WILLIAMS v. ASHE, 111 Cal. 180.

(1896)

THE COURT. (Ashe turned over certain horses to one Kelly in pledge as security for a sum of over four thousand dollars. After holding them for some time Kelly became dissatisfied with the first arrangement, and claimed them as owner, and as such sold and delivered them to plaintiff Williams. Williams supposed he was buying the horses absolutely. Ashe got possession of the horses and Williams brought an action to recover them. The jury returned a verdict for the plaintiff for the return of the property, and found the value of his interest therein to be four thousand nine hundred and nine dollars and seventy-four cents. The judgment was for the return of the horses, and decreeing a lien upon them for the sum named. Defendant appealed from the judgment.) It is the general rule that a (mere) lienholder (as distinguished from a pledgee), who refuses upon proper demand to deliver the property without setting up his lien thereon, or who bases his refusal upon a claim other than that of lien, waives his right to claim a lien after action commenced. * * * It is also the rule that if one having but a lien is sued in replevin, and answers claiming absolute ownership, he will not be per-

mitted upon the trial to assert any right as lienor. His lien is absolutely lost (unless his claim was honest and he abandons the same). But in the case of a pledgee the rule is otherwise. The reason for the distinction seems to be based upon two considerations: 1. That the pledgee has a special property in the chattels which the other class does not possess; 2. That a contract of pledge carries with it the implication that the security may be sold to discharge the obligation, while in case of a lien (except as aided by statute) the right of lien is not understood to carry with it any general right of sale. (Story on Bailments, secs. 311-25.) But whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property or his interest in it to a bona fide purchaser who will be allowed to hold the property until the extinguishment of the original obligation. * * * The rule may be taken as settled that the purchaser under such circumstances succeeds to the rights of the original pledgee. And there can be no reason seen why it should not be so. If one purchases what he believes to be the absolute title, he should not by his mistake be denied the right of taking the limited property which the seller (the pledgee) could convey. It works no hardship upon the pledgor, who, as against the substituted pledgee, has all the rights he possessed against the original. * * *

In this state the question was early considered and decided in accordance with the foregoing views in the case of Dewey v. Bowman, 8 Cal. 145, wherein it is declared that if a pledgee sells the property absolutely without demand or notice to one having full knowledge of his title, while the absolute title does not pass, still the property remains in the hands of the purchaser as a pledge, with the rights to the purchaser which were enjoyed by the original pledgee.

Williams, therefore, succeeded to Kelly's interest and to his right of possession, and the verdict and judgment are within the evidence and responsive to the pleadings. Affirmed.[1]

[1] Brittan v. Oakland Bank of Savings, 124 Cal. 282. (1899)

In the case of bills and notes, a bona fide second pledgee is protected to the amount for which the chattels are pledged to him. He becomes a pledgee for value just as a purchaser becomes a purchaser for value. St. Paul Nat. Bank v. Cannon, 46 Minn. 95 (dictum); 22 Harv. L. Rev. 133-4; Van Zile on Bailments & Carriers, § 243.

Duty of pledgee to sell on request of pledgor.—It is generally held

SCOTT v. REED, 83 Minn. 203; 85 N. W. 1012.

(1901)

Action in the district court for Ramsey county to recover $235 damages for the conversion of a seal-skin coat. The case was tried before Kelly, J., who directed judgment in favor of plaintiff for $165. From an order denying a motion for a new trial, defendant appealed.

LOVELY, J. This is an action to recover the value of property, alleged to have been converted by defendant. The cause was tried by the court, who found that plaintiff was the owner of the property; that she had effected a loan thereon from the defendant at a usurious rate of interest; that it had been used by the pledgee, to the owner's detriment during the period of the pledge; also that the owner had demanded a return of the same, —and upon such facts found, as a conclusion of law, that plaintiff was entitled to recover for its value, which was found by the court.

The facts which authorized these findings may be briefly stated as follows: The plaintiff owned a lady's seal-skin coat and a pair of diamond earrings, upon which she had borrowed sums of money by placing such property in pledge as security for the loans. She was anxious to secure a lower rate of interest, and, through a third party, entered into an arrangement with the defendant to place the earrings and seal-skin coat in pawn to her for $140. To that end the third party, acting for plaintiff, gave a note of $147 to the defendant in his own name, took the property out of the previous pawn, and placed the same in pledge to defendant to secure payment of the new loan. The money actually obtained by this last loan was $140. The additional sum in excess of $140, as the testimony reasonably tends to show, was in consideration of the use of such money at the usurious interest of five per cent. per month. The plaintiff redeemed the

that the pledgee is not bound to sell the thing pledged though requested by the pledgor. 19 Harv. L. Rev. 471.

In California, a pledgee of corporate stock, when the contract is silent upon the subject, has no right to have the stock transferred to his name upon the books of the corporation, but he has a right to cause a proper entry of the transaction between himself and his pledgor. This will fully protect the pledgee and preserve to the pledgor all the rights incident to his ownership. Spreckels v. Nevada Bank, etc., 113 Cal. 272.

earrings by paying the sum agreed upon as their value, leaving the seal-skin coat in pawn. Plaintiff afterwards called upon the defendant to redeem the coat, but, upon examination of the same, determined not to do so, for the reason that it had been damaged by defendant's use of the same while in her possession.

Notwithstanding the zealous contention of defendant's counsel that the evidence does not sustain the findings of the court to the effect that the loan of money by defendant was usurious, and that the seal-skin coat had been used and damaged by defendant while in pawn, yet under the evidence, the findings of the trial court were, in these respects, amply sustained, to the effect that the device by which the $7 was included in the note provided for an unlawful rate of interest, in violation of the usury laws of this state, which conferred no right whatever on the defendant to retain the property as collateral security for a usurious loan. There is evidence, also, to support the view that the third party, who was an undisclosed principal, made the negotiation entirely for the benefit of the plaintiff, which fact was known to the defendant. The testimony was also ample to show that the property, which was wearing apparel, had been damaged while in the possession and care of the defendant, which constituted a conversion of the same, and justified the recovery of its value. Story, Bailm. §329.

The order of the trial court is affirmed.[1]

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4. Termination.

RATCLIFF v. DAVIS, Yelv. 178; 1 Bulst. 29.

(1611)

Trover for a hatband set with diamonds, upon non cul' the jury found, that the plaintiff was possessed of the hatband, and pawned it to one Whitlock for 25£, but that no time for redemption was limited; they found that the wife of Whitlock (the husband being sick) by the assent of the husband delivered the hatband to the defendant; Whitlock died, the plaintiff tendered the 25£. to the wife being executrix, who refused it; and found that the plaintiff demanded it of the defendant, who refused to de-

[1] Limitation of liability by contract.—St. Losky et al. v. Davidson et al., supra.

liver it, and converted it to his own use, et si &c. And judgment pro quer'; for per Curiam, in case of a pawn, he who pledges it has time to redeem it during his life; for it is a condition solely knit by him, and to be performed by him, and the death of him to whom it was pawned is no impediment of the redemption; but it is otherwise of the death of him who pawned it; for his executor cannot redeem it, for it is a condition personal, and being generally pawned extends only to the person of him who pawned it: It was likewise held, per Curiam, that although the defendant had the delivery of the hatband by Whitlock, yet the tender of the 25£. ought to be to the executrix, and not to the defendant, for the delivery makes but a bare custody of it; and if the delivery had been on a consideration, yet it does not alter the case, for the defendant is not privy to the first contract of the pawning, nor to the condition; and therefore it is not like a mortgage, for there he who has interest ought to have the money; but in case of a pledge it is but special property in him who takes it, and the general property continues in the first owner. * * * And it was held, that instantly on the tender of 25£ and refusal of it, the property was entirely reduced to the plaintiff without claim: but per Curiam the executrix shall have debt for the 25£ against the plaintiff, for on the redemption it remains a duty.[1] * * *

MEAD, ADMINISTRATRIX v. BUNN, 32 N. Y. 275.

(1865)

This was an action, in the nature of trover, brought by David Mead, Jr., the appellant's intestate, against William A. Bunn, for the conversion of a promissory note for $133, made by one

[1] Wilson v. Little et al., (1849), supra.

"There is no cogent reason for holding that the pledgee gets so much more extended rights than a bare bailee that he can dispose of the article pledged without losing his lien. . . . Apart from the privilege of pledging up to the amount of the original security,—a proceeding which in no way affects the first pledgor's position.—the pledgee should have no more right than the factor holding his principal's goods, on which he loses his lien in parting with possession. Just as the pledgor may maintain trover for destruction of the pledged goods by the negligence of the pledgee, so should he be allowed trover when the pledgee has repledged the goods for an amount greater than the original pledgor's indebtedness to him." 9 Harv. L. Rev. 540, 159.

Stevens, and others, in favor of the plaintiff, and by him pledged to the defendant.

The defendant was the holder of a bond, executed by the plaintiff and one Crydenwise, on the 8th December, 1857, secured by a mortgage, upon a farm owned by the latter, for the payment of $1053, on the 1st April, 1859, with annual interest. In February, 1858, Crydenwise, who was engaged in the erection of buildings upon his farm, that would enhance its value, cut down ten trees growing thereon. The defendant, thereupon, threatened the obligors with a suit in equity, falsely representing that the mortgage contained a provision, under which the act of Crydenwise, in cutting down the trees, made the whole mortgage-debt payable immediately, as a forfeiture for the breach of the supposed condition; he also represented, that by a contrivance between himself and the scrivener, this clause had been concealed from the obligors, at the time the papers were executed.

On these representations which the referee found to be false and fraudulent, the plaintiff was induced to agree to pay $100 of the principal sum, before it became due; and to pledge as security for such payment, the note now in question, for an amount exceeding that sum, with an agreement that, in case of default, the defendant might appropriate the note to his own use, on indorsing $100 upon the mortgage.

The plaintiff subsequently made a tender of the amount due to the defendant, as stated in the opinion, and demanded a surrender of the note, which was refused; the defendant asserting his right to appropriate it to his own use, and to indorse a credit of $100 on the mortgage; whereupon, this suit was brought.

On this state of facts, the referee directed a judgment in favor of the plaintiff, which having been affirmed at general term, the defendant appealed to this court. The appeal was prosecuted by the plaintiff's administratrix, after his decease.

PORTER, J. The note, for the conversion of which the action was brought, was originally the property of the plaintiff. He continued to be the owner, at the time this suit was commenced, unless his interest had passed, by an effectual transfer, to the defendant.

The interest on the mortgage was paid on the 1st of April, pursuant to the terms of the bond, and on the 20th of the same month, the day appointed for the redemption of the pledge, the

plaintiff offered $63.90 in money, and the balance of the $100, in the dishonored note of a third party, held and owned by him, the payment of which was guaranteed by the defendant; and to this, it is conceded, there was no defense. The acceptance of these was refused, on the sole ground, that the money offered was not tendered in gold. The plaintiff, within a reasonable time, renewed the offer of the guarantee, with the balance in coin. The defendant then raised the objection, that he was not bound to accept the guarantee in part payment, and, as the entire amount was not offered in gold, and the day of payment had passed, he claimed to be entitled to appropriate the $133, secured by the pledged note. He accordingly indorsed on the bond a payment of $100, not due by its terms, and never, in fact, made, and refused to surrender the note, in compliance with the plaintiff's demand.

The tender was insufficient, and the plaintiff would, therefore, be without redress, but for the inherent vice which corrupted the transaction in its origin. It is found, as matter of fact, that the pledge was procured by falsehood, and, though unredeemed, it cannot be permitted to stand. A contract obtained by fraud, though perfect in form, is void in law. The element of fair and free consent is essential to the validity of every mutual engagement. The homely maxim that honesty is policy, is nowhere more firmly rooted and grounded, than in the foundations of our civil jurisprudence. No man can safely rest on a title acquired through his own deliberate wrong; and in the present case, the defendant has no semblance of claim to the note in question, except that which he seeks to deduce from his own fraud.

It is unnecessary to consider the question, whether the extortionate terms of the pledge rendered it void, as contra bonos mores, and opposed to public policy; for the agreement was fatally tainted in its inception, and it was no sooner concluded between the parties, than it was annulled by operation of law.

It is claimed, on behalf of the appellant, that the mortgage was duly recorded, and that the plaintiff was, therefore, chargeable with constructive notice, that the statements of the defendant, as to its contents, were false. No such fact is found by the referee; but, if it were otherwise, it is sufficient to say, that it is neither the purpose nor the office of the recording acts, to charge the immediate parties with constructive notice of the precise

contents of the instruments they execute, but to notify subsequent purchasers and incumbrancers of the rights such instruments are intended to secure.

It is also claimed, that the plaintiff, having heard the mortgage read by the scrivener, before he affixed his signature, was not at liberty to credit the subsequent false and fraudulent statement of the defendant, that it contained a provision declaring the principal due immediately, if growing trees were at any time cut by the mortgagor. On this subject, it is enough to say, that the defendant falsely and fraudulently represented to the plaintiff that, by collusion between himself and the scrivener, the mortgage was so read, by design, at the time of its execution, as to mislead and deceive the parties by whom it was executed.

It is true, that on the 20th April, he offered to pay $100 on the mortgage, if the defendant would surrender the Stevens note; that offer was rejected. If it had been accepted, the defendant would have had the benefit of a payment of a portion of his debt, before it became due. But there was no waiver of the fraud, no recognition of the validity of the pledge, and no release by the plaintiff of his interest in the Stevens note. It belonged to him in his own right; he demanded and sought to reclaim it; the defendant, as the referee finds, rudely refused to surrender it, unless redeemed by the payment of $100 in gold; this was a plain conversion of the note; it was an unavailing attempt to use, for a fraudulent purpose, a possession acquired by fraudulent means. The collateral pledge was void; and no validity was imparted to it, by the unaccepted offer of the plaintiff to pay a portion of the mortgage-debt, before it matured.

It is claimed, that when this offer was made, if not before, the plaintiff was constructively chargeable, by lapse of time, with notice of the fraud by which the defendant had entrapped him into the engagement. This proposition rests on the mistaken assumption, that a false representation by one of the parties to a contract puts the other on inquiry as to its truth. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which, the other party to the contract,

with full means of knowledge, has deliberately pledged his faith. The judgment of the court below was right, and should be affirmed, with costs.

LOUGHBOROUGH (CASSERLY, DECEASED) v. McNEVIN ET AL., 74 Cal. 250; 14 Pac. 369; 15 Pac. 773.

(1887)

THORNTON, J. The judgment and order appealed from are affirmed for the reasons given in the decision by Department Two, filed June 27, 1887.

The following is the opinion of Department Two, above referred to:—

THORNTON, J. The plaintiff's intestate, some time prior to October, 1876, lent defendant Henry P. McNevin a sum of money, for which he received as security some shares of stock. On the 19th of July, 1877, McNevin assigned to defendant L. P. Drexler his interest in the stock above mentioned, in consideration that Drexler would assume the payment of his debts due to Casserly on said stock. This assignment Drexler accepted, and on the 21st of the same month informed Casserly of such assignment. On receiving this notice, Casserly, on the same day, declared his willingness to deliver the stock to Drexler upon receiving the money secured by it. On the 22d of September, 1877, Drexler made a legal tender to Casserly of the amount due to him on the stock, and demanded a delivery of it. Casserly made no objection to the tender, admitted that it was correct and sufficient, but refused to accept the money and deliver the stock, on the ground that process of garnishment in the matter of an order for money against Henry P. McNevin in favor of defendant Teresa E. McNevin had been served on him September 1, 1877. On the 28th of September, 1877, six days after the tender was made and refused, this action was commenced by Casserly. Henry P. McNevin, Teresa E. McNevin, and Drexler were made defendants to the action. The object of the action was to have an account taken of the amount due by McNevin to him, that the money found due him be adjudged to be paid to him by Teresa E. McNevin or Drexler, as either shall be

found entitled thereto, and in default of payment, that the defendants be foreclosed of all right of redemption, etc., for a sale, etc.

J. F. Eagan, on the 18th of February, 1879, filed a complaint in intervention, in which he averred an assignment to him by Drexler of the stock held by Casserly as security, and also of all claim for damages by Drexler for the conversion of the stock thereinafter mentioned. He then goes on to aver the facts showing a conversion by Casserly, which are the facts above set forth by Drexler in his answer, and the further fact that Casserly refused, upon the tender made him in September, 1877, to accept the said amount tendered, and deliver the stock to Drexler. Casserly demurred to the complaint of Eagan, which was overruled. He then answered the complaint last mentioned, denying the conversion averred.

The cause was tried, and judgment rendered against Casserly in favor of Eagan for the sum of $15,225, and costs. Casserly moved for a new trial, which was denied. This appeal is prosecuted from the judgment and order above mentioned.

Casserly held the stock as a pledge. He so states in his complaint; and under section 2924, Civil Code, having it in his possession, as it was personal property, it was a pledge whether the title passed to him or not.

The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law and its refusal by the pledgee. (McCalla v. Clark, 55 Ga. 53; Ratcliff v. Vance, 2 Mill Const. 239.) Upon such tender being made and refused, the pledgor is entitled to the property pledged, and certainly when, on or after such tender, a demand is made for the pledge, which is refused, a conversion takes place. (See cases just above cited.) The refusal to deliver the pledged property on demand is an exercise of dominion over the property of another in defiance of the other's right, which is a conversion. (Dodge v. Meyer, 61 Cal. 420, 421.) Such conversion is wrongful, and extinguishes the lien, under section 2910, Civil Code. (See Rodgers v. Grothe, 58 Pa. St. 414; Davis v. Bigelow, 62 Pa. St. 242; Lawrence v. Maxwell, 53 N. Y. 19.)

Was the tender in this case made in accordance with law? It was of the whole amount—principal and interest—due to Casserly. The demand made at the same time that the stock pledged

be delivered to him, conceding it to be a condition, was one which he had a right to impose, as it was concurrent with the payment of the money in accordance with Casserly's promise in his letter of July 21, 1877, to Latham and King, the agents of Drexler, that on payment of the money, he would transfer the stock, which latter was communicated by Latham and King to Drexler. The announcing of such condition did not vitiate his tender. It is so declared in section 1498, Civil Code. (See Wheelock v. Tanner, 39 N. Y. 481.)

The tender was made in time. The code (sec. 1490, Civ. Code) provides that where an obligation fixes the time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterward. But where an obligation does not fix the time of performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform. (Sec. 1491, Civ. Code.) The obligation of McNevin was to repay the advances after a reasonable time, whenever he should be thereunto requested by the plaintiff. This was served in the complaint and not denied in the answer. The time of performance was not then fixed by the obligation. A request to pay, which is tantamount to a demand, was made by Casserly of McNevin on or about the 26th of June, 1877, and refused. The tender could not have been made after this demand except for section 1492, Civil Code, which provides as follows:—

"Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditors, or any other person in the meantime."

We are of opinion that the tender is good under this last section, as the interest offered was compensation for the delay.

It is said that the plea of tender by Drexler is insufficient for the reason that he did not bring the money into court. We think the plea is sufficient without bringing the money into court. This is so held in Kortright v. Cady, 21 N. Y. 343, 354, 366; 78 Am. Dec. 145. The authorities referred to in the cases just cited in the opinions of Davis, J., and Comstock, C. J., sustain this rule. The plea here is in accordance with section 1495, Civil Code, and

it is expressly provided by section 1504, Civil Code, that an offer of payment duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as performance thereof. One of these incidents is the discharge or extinction of the lien. The rule laid down in Kortright v. Cady is the same. (21 N. Y. 353, 366; 78 Am. Dec. 145.)

The tender was not objected to by Casserly when made. The lien having been extinguished, Drexler was entitled to the possession of the stock. Casserly then had no right to withhold it from Drexler.

We cannot see how an attachment by Teresa McNevin, a third person, with whom Drexler had no connection or privity, could justify the plaintiff's intestate in his detention of the stock.

The stock was the property of Drexler when it was attached, subject to the lien for the debt due to Casserly, and the attachment of it as the property of H. P. McNevin gave him no right to detain it from Drexler, when a proper tender had been made and refused.

The answer of Drexler was in effect an action to redeem. In such action, whether the right is enforced by an action of trover or by a bill pure and simple to redeem, the pledgee will be responsible to the pledgor for depreciation in the value of the pledged property, after a tender of the amount due and the refusal by the pledgee. (Griswold v. Jackson, 2 Edw. Ch. 461; Jackson v. Griswold, 4 Hill, 522; Hathaway v. Fall River National Bank, 131 Mass. 14; Hancock v. Franklin Ins. Co., 114 Mass. 155.) Eagan's complaint in the intervention set forth the right to redeem, as well as did the answer of Drexler, and in fact more fully by stating a case of conversion. The action of trover is a very usual mode of enforcing a redemption of a pledge. (See Jones on Pledges, sec. 561.)

We are of opinion that the complaint in intervention by Eagan was regular and within the statute. (Code Civ. Proc., sec. 386.)

We find no error in the record, and the judgment and order are affirmed.

NORTON v. BAXTER ET AL., 41 Minn. 146, 42 N. W. 865.

(1889)

Appeal by defendants Lucy and Stephen H. Baxter from a

judgment of the district court for Hennepin county, where the action was tried by Hicks, J.

DICKINSON, J. This is an action to foreclose a mortgage upon a lot of land, designated as lot 14, executed by the defendants Tousley and wife to the plaintiff, in August, 1887, and to bar or enjoin these appellants Lucy Baxter and Stephen H. Baxter from proceeding to enforce an earlier mortgage, executed by one Nye, in 1886, under circumstances to be hereafter referred to. This appeal by the two defendants just named is from a judgment granting that relief. The mortgage last referred to, which the appellants claim the right to enforce as the earlier lien, was executed under these circumstances: September 20, 1886, Tousley and wife conveyed several lots of land, including this lot 14, to one Nye, without consideration, and for the use and benefit of the grantor, Tousley. The same day Nye gave to Tousley her (Nye's) promissory note for $2,500, for the accommodation only of the payee, and executed to him a mortgage upon the same land, in terms securing the payment of the note. Subsequently, prior to Tousley's mortgage to the plaintiff, Nye reconveyed the property to Tousley. While Tousley held the accommodation note of Nye and the mortgage securing it, in October, 1886, he borrowed $700 from the defendant Stephen H. Baxter and a brother, William Baxter, giving to them his note therefor, payable to the defendant Lucy Baxter. As collateral security Tousley executed an assignment to Lucy Baxter of the Nye note and mortgage, and delivered it to the Baxter brothers. Lucy Baxter had no interest in this transaction, and knew nothing of it, her name being employed for the benefit of the brothers. An agreement accompanied the assigned note and mortgage, authorizing the sale of the pledge after notice, upon default of Tousley to pay the debt secured thereby. June 22, 1888, W. H. Baxter, assuming to act in behalf of Lucy, after notice to Tousley, offered the pledged note and mortgage for sale at auction. Tousley bid $800 for it, and no other bona fide bid was made; but the note and mortgage were struck off to one Prouty at $817. The securities were then assigned to him, although he paid nothing therefor, and here assigned the same to Stephen H. Baxter, June 29, 1888. Tousley tendered to the Baxter brothers, who then had possession of the Nye note and mortgage, and to Stephen H. Baxter, the sum of $820 in payment of his own note, which the

Nye note and mortgage had been pledged to secure. This tender was sufficient in amount to pay his debt. The tender was refused.

The pretended sale of the pledged securities to Prouty, and the assignment of the same to him, and by him to Stephen H. Baxter, were not effectual as a sale of the securities so as to extinguish or prejudice the previously existing rights of the pledgor. The general property in the pledge remained in the pledgor after as well as before default. The default of the pledgor to pay his debt at maturity in no way affected the nature of the pledgee's rights concerning the property, except that he then became entitled to proceed to make the securities available in the manner prescribed by law or by the terms of the contract. It is not the case of a defeasible title becoming absolute at law by default in the performance of the prescribed condition. The property was held as security before default. It was held only as security after default. The pledgee was authorized to sell the securities, and by a sale in good faith the pledgor would have been divested of his property. But the pledgee could not give it away, so as to affect the rights of the pledgor, nor could a pretended and merely colorable sale, without consideration, divest the pledgor of his rights as such, or confer upon the pretended purchaser any greater interest than that held by the pledgee.

The question which the appellants now present is whether, upon tender of payment of the principal debt, the pledged note and mortgage ceased to be available and enforceable as collateral securities. It is a general principle that tender of payment of a debt, to secure which personal property has been pledged, discharges the lien, terminating the special property rights of the pledgee. Coggs v. Bernard, 2 Ld. Raym. 909, 917; Ratcliff v. Davies, Cro. Jac. 244; Hancock v. Franklin Insurance Co., 114 Mass. 155; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Ball v. Stanley, 5 Yerg. 199, (26 Am. Dec. 263;) Mitchell v. Roberts, 17 Fed. Rep. 776; Loughborough v. McNevin, 74 Cal. 250, (14 Pac. Rep. 369, 15 Pac. Rep. 773;) Ratcliff v. Vance, 2 Const. (S. C.) 239; Kortright v. Cady, 21 N. Y. 343, (78 Am. Dec. 145;) Cass v. Higenbotam, 100 N. Y. 248, (3 N. E. Rep. 189;) Moynahan v. Moore, 9 Mich. 8, (77 Am. Dec. 468;) Stewart v. Brown, 48 Mich. 383, (12 N. W. Rep. 499.) The appellants concede that while the general rule is that tender of the

amount due, at the time it becomes due, discharges the lien of collateral securities, yet contend that such is not the effect of a tender after that time. Such a distinction has been recognized in respect to mortgages, based upon the fact that the legal title has become vested in the mortgagee. No such distinction can be made in the case of bailments of personal property as security. The relations and rights of the parties are unchanged by the occurrence of the default. The pledgee has not even after default the absolute legal title. The character of the bailment is not changed. It is still a pledge, and can be enforced or made available only as such. But the very terms of the contract in this case were that, if the debt should be paid "before the sale of said property," the property should be returned.

The appellants rely, also, upon the fact that, so far as appears, the tender of Tousley was not kept good. There is some conflict in the authorities at the present day as to the necessity for this, in general, in order that the lien of the pledge may be discharged. We deem it unnecessary to determine whether the strict rule of the common law has been modified. It may be conceded for the purposes of this case that upon equitable grounds a pledgor, whose tender has been refused, should not be allowed affirmative relief, especially of an equitable nature, unless he has kept good his tender, or at least comes before the court in an attitude of willingness to pay what is due from him. Tuthill v. Morris, 81 N. Y. 94. The defendants in this case are not entitled to favor upon equitable grounds. The tender made by Tousley, the common debtor of both parties, was sufficient, and, so far as appears, there was nothing to justify the refusal to accept it or to qualify the strict legal effect of the refusal. After an unauthorized and, as it would seem, a fraudulent sale, Baxter, who was a party to it, refusing to accept from Tousley the payment of his debt, asserts in this action the right to hold and enforce the pledged securities, not merely as securities for his debt of $700, but as his own property, the mortgage being an incumbrance of $2,500, with interest. This plaintiff has not been in default. He owes nothing to the defendants, and is not chargeable with fault because the debtor did not keep his tender good. He, also, is a creditor of Tousley, having mortgage security junior to that which was pledged to the defendants. Tousley, the common debtor, was bound to pay both. The unjustified refusal of Baxter to accept payment was

prejudicial to the plaintiff holding the junior mortgage. The pledged note and mortgage of Nye, if released from the pledge, would not, as to the plaintiff, have been available in Tousley's hands as a senior incumbrance upon the land, having been executed for the accommodation of Tousley. In view of the relations between the plaintiff and Baxter, there appears to be nothing to modify the strict rule of the common law that a tender of payment of the debt discharges the pledge, so far, at least, as it affects the plaintiff. Of course, the debt of Tousley was not thus discharged.

Judgment affirmed.

COOLEY v. MINNESOTA TRANSFER R. CO., 53 Minn. 327, 55 N. W. 141.

(1893)

On October 14, 1889, at Minneapolis, the plaintiff, Edwin Cooley, signed as surety, or indorsed, notes for the benefit of Cable & Chute, railroad contractors, to the amount of $7,362.43, due one year thereafter. To secure him against loss, they mortgaged to him on that day their horses and mules and other personal property used in grading. In May following, the property was taken by consent of both parties to Custer City, South Dakota, to work on a railroad which Cable & Chute had contracted to grade at that place. When these notes fell due, plaintiff was compelled to pay them, and in March, 1891, he sent A. D. Polk, his agent, to Deadwood, S. Dak., to take the property or make new arrangements for his indemnity. Cable & Chute then turned over the property to this agent in pledge for the payment of their debt to plaintiff, and he shipped it, eleven carloads, to Minnnesota Transfer, near St. Paul, sending men with it and having possession of it. To avoid paying freight it was shipped in the name of, and consigned to, Cable & Chute, for when they took the grading contracts it was agreed that their property was to be taken out there and returned free of freight.

On its arrival, April 8, 1891, the defendant, the Minnesota Transfer Railway Company, unloaded and stored the property and fed the horses and mules, and kept it until May 15th following, claiming a lien on it as warehousemen for the expense and

their charges amounting to $489. Meantime, on April 13, 1891, William Hogan commenced an action in the District Court against Cable & Chute to recover $1,500 and interest due him upon a promissory note made by them to him November 25, 1890, and then past due. He made affidavit and garnished the Minnesota Transfer Railroad Company, as having property in their hands belonging to Cable & Chute. John C. Bullitt, Jr., was appointed agent of the Railway Company to make its disclosure, and he stated the facts before a referee who reported the disclosure to the District Court. Meantime, on May 4, 1891, the plaintiff, Cooley, demanded the property and commenced this action in replevin against the Railway Company, gave bond and took possession of the property. The company answered, claiming a lien for the $489, and stating the garnishment they were under. On June 29, 1891, Cooley agreed with Cable & Chute to take the property absolutely, and allow them $5,000 for it upon the debt for which it was pledged. Plaintiff then sold it, realizing $4,460 for it. Hogan obtained judgment in his suit May 6, 1891, for $1,603.23. He moved the court November 14, 1891, to be permitted to intervene and become a party to this replevin suit. This motion was unopposed, and he intervened, and filed his complaint in intervention. He claimed that plaintiff's mortgage, the pledge made in Dakota, and the sale on June 29, 1891, were all invalid, fraudulent and void as against creditors; and this was the question litigated at the trial.

The trial court made findings of fact and ordered judgment against plaintiff for a return of the property, or, if a return could not be had, then that the Railway Company recover $489, and interest and costs; and Hogan recover $1,603.23, the amount of his judgment against Cable & Chute, with interest and costs. Plaintiff moved for a new trial, and being denied, appeals. * * *

DICKINSON, J. * * * A chattel mortgage had been given by Cable & Chute to the plaintiff, covering some, but not all, of the property here involved, long before the alleged pledge. We deem this of little importance, for if we could ascertain from the case what part of this property was included in the mortgage, it does not appear what was the value of the same. The plaintiff's case really rests upon the pledge, rather than upon the prior mortgage.

The case, as between the plaintiff and the railway company, seems plain irrespective of the question as to the sufficiency and

effect of the pledge. When the plaintiff demanded possession of the property, there having been a delay of several days on account of some unadjusted claim of charges for transportation, the defendant was not holding the property in the relation of a carrier, but as a warehouseman, and such had been the case for some six days; and in the meantime, and just before such demand, the garnishment had been made in behalf of Hogan. The garnishment legally charged the company with the responsibility of retaining the property, as in custody of the law, in order that it might be applied to the satisfaction of Hogan's debt, if he should succeed in maintaining his claim. It excused the company from delivering the property to the plaintiff. Drake, Attachm. 453; Stiles v. Davis, 1 Black, 101. Whether goods in possession of a common carrier, and while actually in transit, may be the subject of garnishment, we do not consider. We do not construe the finding of the court to be that the defendant retained the property as a common carrier.

The defendant company had a lien upon the property for its proper charges for keeping it; and the determination of the court, awarding a recovery therefor against the plaintiff, who had replevied and sold it, was justified by the evidence, and was in accordance with the law. Whether the pledge was complete and effectual, or not, the result, in this particular, would be the same.

Different questions are presented, as between the plaintiff and the intervener. As between them, the question is one of priority of rights. If the pledge to the plaintiff was complete and effectual, and was still in force at the time of the garnishment by Hogan, any rights which the latter might acquire by the garnishment would be subordinate to those of the plaintiff as pledgee.

It does not appear on what ground, or for what reason, the court found the pledge to have been void as to Hogan, a creditor of Cable & Chute. If it was because the evidence was deemed insufficient to establish the fact of the pledge having been made at Deadwood, we should be compelled to say that the court had failed to fully appreciate the force of the evidence; for, as we read it, it is all one way, and was of such a nature as to forbid any other conclusion than that the property was, by Cable & Chute, actually and completely delivered to, and taken possession of by, the plaintiff, to be by the latter retained, and dis-

posed of for his reimbursement. It may be supposed, however, that the court considered that the circumstances connected with its transportation to St. Paul avoided or terminated the pledge, or precluded the plaintiff from asserting his rights as a pledgee, as against Hogan. These circumstances were as follows:

Cable & Chute had taken the property to Deadwood pursuant to some agreement with Streeter & Co., who had some contract or work of railroad construction there. Cable & Chute had a subcontract under Streeter & Co., and their agreement with Streeter & Co., involved an undertaking on the part of the latter to furnish transportation for this property to Deadwood, and back to St. Paul. Cable & Chute had completed their contract, so that they were entitled to call upon Streeter & Co. to have the property returned to St. Paul without expense to them. When the property was pledged to the plaintiff, his agent, who had it in his possession, arranged with Cable & Chute to conceal this fact from Streeter & Co., lest the latter should refuse to abide by their agreement to have it transported back to St. Paul. Hence the shipment was made in the name of Streeter & Co., and Cable & Chute were named as consignees; and Streeter & Co. arranged the matter of transportation so that no charge was made therefor to the plaintiff, nor to Cable & Chute.

This did not avoid or terminate the pledge. The plaintiff employed an agent who remained in charge of the property during its transportation to St. Paul. The possession was never in fact restored to Cable & Chute, nor do they appear to have ever claimed to be in possession after they delivered the property to the plaintiff. As between those parties, it is certain that the pledge remained effectual. Even if, after the property had been delivered in pledge to the plaintiff, the latter had entrusted it again to the pledgors as his agents or bailees for the special purpose of taking it to St. Paul in his behalf, to be there again restored to him, we suppose that the pledge would remain good. The possession of the original pledgors, as the agents of the pledgee, would be his possession. Casey v. Cavaroc, 96 U. S. 467. But, however that may be, this case is stronger for the plaintiff than that just supposed, for the property was not in fact redelivered to the pledgors, but remained, uninterruptedly, in the custody of the plaintiff's agent.

The fact that the plaintiff, for the purpose above stated, employed the names of Cable & Chute as consignees, so that it might appear that the property was shipped for them, did not, as we have said, divest the plaintiff of his pledge. Neither did it subordinate the plaintiff's rights, as pledgee, to the subsequent claim of Hogan under garnishment, or estop the former from claiming the preference which his pledge secured to him. There is no registry law relating to the pledging of property. If the pledge was effectual, it is not material whether Hogan had notice of it or not. His debt was not created in reliance upon any appearance of continued possession, or of absolute title, in Cable & Chute, by reason of their being named as consignees. It long antedated the transactions here in question. Nor, even if the concealment of the pledge from Streeter & Co., for the purpose stated, was a fraud upon the latter, it would not affect the case of Hogan. It did not concern him in any way. But it is not even apparent that the concealment was a fraud upon Streeter & Co. Their agreement to secure free transportation back to St. Paul was not discharged by the pledging of the property to the plaintiff. In brief, the pledge to the plaintiff was valid, and was prior and superior to any rights acquired by the subsequent garnishment, and there is nothing in the case to estop him from asserting his superior right.

A considerable time after the garnishment, while the plaintiff still held the property, it seems that Cable & Chute sold the same to him for a specified price, which he was to apply as payment on the indebtedness to him. It is contended that thereby the plaintiff waived and lost his rights as pledgee, so that, by reason of the garnishment, the intervener's rights were superior to any remaining in the plaintiff. We cannot so hold. The transfer of the legal title, for a specified price, to be applied on the debt, was not inconsistent with, and did not divest the plaintiff of, the essential rights which he already had under the pledge; that is, the possession of the property, and the right to dispose of it for the satisfaction of his debt. That right still remained, as against creditors of the pledgor who might have secured attachments subsequent to the pledge. It may be that the added interest which the sale conferred—the legal title— was held subject to the intervening garnishment, and that the plaintiff might be accountable to the intervener for the value of the property in

excess of the debt, if there was any such excess. But the case does not present that question.

As between the plaintiff and the defendant railway company, the order is affirmed. As between the plaintiff and the intervener, it is reversed.[1]

BENDEL v. CRYSTAL ICE CO. ET AL., 82 Cal. 199.

(1889)

Appeal from a judgment of the Superior Court of the city and county of San Francisco, and from an order denying a new trial.

WORKS, J. (The Crystal Ice Co. executed a chattel mortgage to one Wainwright to secure the payment of a promissory note, and in the mortgage was a clause which provided that the property might be sold, in case of default, as provided by the Code of Civil Procedure in case of pledges, except that a demand of performance and notice to the pledgor were waived, and it was provided that the pledgee might become a purchaser at the sale. Default was made in the payment of the note, and Wainwright, acting under the above authority, sold the property, and after several transfers, the same was purchased by appellant Pauson. property, and brought this action against the ice company and Pauson to foreclose his junior mortgage. The ice company made default. There was a trial as to defendant Pauson, and judgment was rendered foreclosing the mortgage as to him. He moved for a new trial, which was denied, and he appeals.)

Therefore, the question is, whether the statutory requirements not waived were so far complied with (by Wainwright) as to render the sale valid as against a junior mortgagee.

The code provides: "The sale by a pledgee of property pledged must be made by public auction, in the manner and upon notice to the public usual at the place of sale in respect to auction sales of similar property, and must be for the highest obtainable price." (Civ. Code, sec. 3005.)

There are other sections requiring that the pledgee demand performance from the debtor, if he can be found, and that he give such pledgor actual notice of the time and place at which the property pledged will be sold, at such reasonable time before

[1] A pledge without transfer of possession. 12 Harv. L. Rev. 134.

the sale as will enable the pledgor to attend. (Civ. Code, secs. 3001, 3002.) But these last requirements may be waived by the pledgor. (Civ. Code, secs. 3003, 3004.)

(The trial court found that the sale was not according to sec. 3005 of the Code of Civil Procedure.)

It is claimed by appellant that this finding was not sustained by the evidence. * * * (These requirements were not waived.)

It appears from the evidence, that the property was of such a kind that but few persons would be likely to want to purchase it, and that it was of the value of from five thousand to six thousand dollars. The notice given was for two days, and did not show that the property was to be sold for the satisfaction of the Wainwright mortgage, or any other mortgage. There was nothing in the notice to call to the attention of the respondent, who was an interested party, or to any one else, that the property to be sold was the property covered by these mortgages, except the description of the property. The property was bought in by the mortgagee at one thousand dollars, which was not more, and was probably less, than one-fifth of its actual value.

The evidence showed beyond controversy that the notice as to time was not such as was "usual at the place of sale in respect to auction sales of similar property."

The undisputed evidence was, that notices of such sales were never for less than five days, and the great weight of the evidence was that the usual notices of like sales were from ten to twenty days.

We think that the finding that the sale was not made in conformity to statute was sustained by the evidence, and that the judgment was right. Judgment and order affirmed.[1]

[1] The ordinary rule is that negotiable paper held as collateral security cannot be sold by the pledgee, but can only be collected at maturity, but stipulations allowing sale are valid. 14 Harv. L. Rev. 462.

The effect of a foreclosure sale by the pledgee of a real estate mortgage held as collateral security is the substitution of the land for the mortgage in the hands of the assignee, who takes the legal title subject to a trust in favor of the pledgor, unless the mortgagee pledgor is joined in the foreclosure sale, or unless the pledgee buys in the property at the mortgage sale with the pledgor's express authority. 22 Harv. L. Rev. 541-2.

Termination of pledge.
  By act of parties.
    By act of pledgor.
      Payment.
      Tender.
    By act of pledgee.
      Redelivery.
      Forfeiture by wrongful conduct.
        Fraud.
        Conversion.
    By default by pledgor and foreclosure by pledgee.
      Essentials.
        Demand for payment.
        Notice of time and place of sale.
        Public auction.
        Pledgee should not buy.
      Effect.
        Vests in purchaser title of pledgor and pledgee.
  By act of law.

The destruction of the chattel, or merger, or judgment on the debt will work an extinction of the pledge relation, but a change in the status of the parties, as by death, marriage, or insolvency, will not affect the pledge contract.

CHAPTER VI.

ORDINARY HIRING BAILMENTS[1]

I. CREATION.

LEARNED-LETCHER LUMBER CO. v. FOWLER,

109 Ala. 169; 19 So. 396.

(1895)

The appellee, G. W. Fowler, brought this action before a justice of the peace, against the appellant, the Learned-Letcher Lumber Company, claiming one hundred dollars due by account for lumber sold to the defendant. The justice rendered a judgment for the plaintiff, and the defendant appealed to the City Court. In that court the defendant pleaded, (1) the general issue, (2) payment, (3) set-off, claiming $354.00 due for goods, wares and merchandise sold by defendant to plaintiff and the following special plea: "(4) A plea of set-off, viz.: That plaintiff was indebted to the defendant in the sum of $102.00 at and before the institution of the suit, due by a contract in writing in words and figures as follows:

Rent Contract, Anniston, Ala., July 19, 1893.

[1] The ordinary hiring bailments include,
the hired (by the bailee) use of a thing { custody }
hired (by the bailor) services about a thing { work / carriage }

"The contract of letting and hiring is usually divided into two kinds:—(1) Locatio, or locatio conductio rei, the bailment or letting of a thing to be used by the bailee for a compensation to be paid by him. (2) Locatio operis, or the hire of the labor and services of the bailee for a compensation, to be paid by the bailor. And this last kind is again subdivided into two classes:—(1) Locatio operis faciendi, or the hire of labor and work to be done, or care and attention to be bestowed, on the goods bailed by the bailee for a compensation; or, (2) Locatio operis mercium vehendarum, or the hire of the carriage of goods from one place to another for compensation." Story on Bailments, § 370.

I, G. W. Fowler, agree to rent from the Learned-Letcher Lumber Company three head of oxen, described as follows: One dark red, one black and white, one yellow and white. I agree to pay for the use of the oxen $1.00 per day. I also agree to feed and take good care of these oxen and return them to the Learned-Letcher Lumber Co. in as good condition as they are now in. These cattle are those purchased by the Learned-Letcher Lumber Co. from W. J. Higgins.

G. W. FOWLER.

Witness: O. T. Letcher."

And the defendant avers that the plaintiff had the use of the said oxen under the contract 102 days, and is, and was at the institution of the suit, indebted to defendant in the sum of $102 on account thereof, which said sum defendant offers to set-off against plaintiff's demand and asks judgment for the excess." Issue was joined, and the trial was had on these pleas.

There were verdict and judgment for the plaintiff for $53.60, and the defendant appeals.

BRICKELL, C. J. The contract in reference to the oxen is styled a "rent contract," and the promise of the maker is to "rent" the oxen. This verbal inaccuracy must be disregarded in the interpretation of the contract. In its true significance, technical and ordinary, "rent" is compensation for the possession and use of lands or of things corporeal. "Hire" pertains to things personal, and is the reward or compensation to be yielded for their possession or use. It is, of consequence, plain that the word "rent" was by the parties intended to bear the meaning of "hire." Hiring is a known species of bailment, and one of its distinguishing characteristics is that it is never gratuitous,—it is always for a reward or compensation.—Story on Bailment, § 8. The relation between the parties created by the contract was that of bailor and bailee. The duration of the bailment—the term of the hiring of the oxen—is not expressed; it was, therefore, subject to termination at the will of bailor and bailee; neither could insist, against the election of the other, that it should continue. As to the liabilities and duties of the bailee, the contract contains two separate, distinct stipulations. The first is that the hirer shall pay $1.00 per day for the use of the oxen. The second is, that he shall feed and take care of them, returning them to the bailor in as good condition as they were

in when received. The contract of itself separates and distinguishes the stipulations. The one is not to make pecuniary compensation during the continuance of the bailment, but only for the days the oxen were used or employed. If the bailment continued for any length of time, there would be of necessity, as the parties knew, days when the oxen could not be used, or would not be used. Therefore, the pecuniary compensation was limited to days in which there was use of them. But, whether in use or idle, the oxen must be cared for and fed so long as the bailment continued; and, therefore, this duty of the bailee was not limited, like the pecuniary compensation, to the days of the use. This was the construction given the contract by the city court in its instruction to the jury, and there is no error in the instruction given, or in the refusal of the instruction requested.

Let the judgment be affirmed.[1]

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2. Obligations of Bailee.

DEAN v. KEATE, 3 Camp. (N. P.) 4.

(1811)

This was an action for the improper treatment of a horse, let to hire by the plaintiff to the defendant.

The defendant jobbed a pair of coach-horses of the plaintiff. One of them being slightly indisposed, the defendant wrote a prescription for him. This medicine was not of itself calculated to do any injury; but after the horse had swallowed it, the defendant put him into harness, gave him strong exercise, and kept him exposed to the inclemency of the weather. In consequence of this treatment, the animal was seized with an inflammation in the intestines. The defendant then, without consulting a veterinary surgeon, very imprudently prescribed a stimulating dose of opium and ginger, and the horse soon after taking it died in great agony. Medical advice was called in when it was too late.

[1] "It is obvious that several ingredients are of the essence of the contract. (1) There should be a thing in esse which may be the subject-matter of the contract. (2) It should be a thing capable of being let. (3) The bailee should have a right to use, enjoy, and possess it, during the period for which it is let. (4) There should be a price for the hire. And (5) There should be a contract possessing a legal obligation between the parties." Story on Bailments, § 372.

LORD ELLENBOROUGH. The question is, whether the defendant has been guilty of gross negligence with respect to the horse. Had he called in a farrier, he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff.

The plaintiff had a verdict for 60 guineas.[1]

CLARKE v. EARNSHAW, 1 Gow. 30.

(1818)

Assumpsit. P entrusted D (a chronometer maker) with a chronometer or time-piece to be repaired. D had in his employ a servant who slept in his shop. This servant stole P's chronometer, along with other watches belonging to defendant and other parties. D had an iron chest in which he locked up watches belonging to himself. The outer doors and windows were properly fastened.

DALLAS, C. J., was of opinion, that the defendant was bound to protect the property against depredations from those who were within the house. He had taken care of his own property

[1] In Coggs v. Bernard, 2 Ld. Raym. 916, it is laid down by Lord Holt, "that if goods are let out for reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses;" and in Bul. N. P. 72, it is said, "that the hirer is to take all imaginable care of the goods delivered to hire." According to this doctrine, he would be answerable for slight negligence. But on a review of all the authorities upon the subject, it will be found that this extraordinary care is required only of a borrower, and that from the true construction of the contract of locatio conductio rei, the hirer is required to use no more than that degree of diligence which prudent men, that is, the generality of men, use in keeping their own goods. "If Caius, therefore, hire a horse, he is bound to ride it as moderately, and treat it as carefully, as any man of common discretion would ride and treat his own horse." See Jones on Bailments, 86.

By the weight of American authority, public officers, who are entrusted with the keeping of public funds, are absolutely liable where such funds are lost, without regard to the question of fault on the part of the officer. United States v. Prescott, 3 How. (U. S.) 578; Street, Found. of Leg. Lia. 292-293.

by locking up and securing it. The servant in this case had been improperly trusted; and the defendant was guilty of gross negligence in leaving him in care of the goods.

The jury found a verdict for the plaintiff for £56.[1]

THE MAYOR AND COUNCIL OF COLUMBUS v. HOWARD, 6 Ga. 213.

(1849)

Elizabeth Howard brought suit against the City Council of Columbus. The declaration contained two counts. The first, in trover, for a certain negro slave, Braden; the second, in case, setting out that she had hired a certain negro, Braden, to the City Council, for the year 1844, to be employed specifically, in working the streets of said City, in cleaning and repairing the same; that the Council placed the said negro to do other work, to wit: "to work upon, by and under the precipitous bank at the mouth of the sewer or drain of said City," and that by the breaking and falling off of said bank the slave was killed.

The Jury returned a verdict for the plaintiff for $800.

Whereupon, defendants moved for a new trial.

1st. Because the verdict is contrary to the evidence and the charge of the Court.

2d. Because the Court erred in admitting the evidence of witness Toney, as to the admissions of Council.

By the Court.—LUMPKIN, J. delivering the opinion. * * *

It only remains, therefore, to inquire whether the verdict was contrary to the evidence and the charge of the Court. The Court charged the Jury, that if the defendants had the negro in their employment, as contemplated by the contract of hire, and he was killed without any neglect on their part, that then they were not liable, otherwise they were.

It is not complained that the law of the case was not correctly stated. But assuming that to be true, a re-hearing is asked, because the verdict is contrary to the charge. Surely it will not be pretended that there was not some proof of negligence, and if so then the verdict was not contrary to the charge.

[1] Wrongful appropriation by servant.—29 L. R. A. 92; Sanderson v. Collins (1904) 1 K. B. 628.

4. The law, we apprehend, is this; there is, on the part of the hirer of property, an implied obligation not only to use the thing, be it servant or horse, or anything else, with due care and moderation, but also not to apply it to any other use than that for which it was hired. If a horse is hired as a saddle horse, the hirer has no right to use the horse in a cart, or to carry loads as a beast of burden. So, if a carriage and horses are hired for a journey to Boston, the hirer has no right to go with them on a journey to New York. So, if horses are hired for a week, the hirer has no right to use them for a month. So, if a negro is hired to work on the streets of the City of Columbus, the City Council have no right to employ him in blasting wells, pulling down old walls, or leveling dangerous and precipitous embankments, although the work be within the limits of the streets, as delineated in the map of the town.

5. And it may be generally stated, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, although by inevitable casualty, he will generally be responsible therefor. Such misuse is deemed, at the Common Law, a conversion of the property, for which the hirer is generally held responsible to the letter, to the full extent of the loss. Story on Bailments, § 413. 1 Cow. 322. Jones on Bailments, 68. 2 Lord Raymond, 915. 12 Pick. 136. 3 Pick. 492. 5 Mass. R. 104. 1 Const. Rep. S. C. 121.

6. The question has been much mooted, what degree of care or diligence is required of the hirer, while using the property for the purpose, and within the time for which it was hired. Sir William Jones considered that the contract being one of mutual benefit, the hirer was bound only for ordinary diligence, and of course was responsible only for such. Jones on Bailments, 86, 87, 120. And this opinion appears to be now settled, upon principle, to be the true exposition of the Common Law. 2 Kent Com. Lect. 40. 3 Cowp. Rep. 4. 13 Johns. 211. 2 Brod. & Bing. 359. 7 Cowen. R. 497. Gilpin, 579, 585, 586. He ought, therefore, to use the thing, and to take the same care in the preservation of it, which a good and prudent father of a family would take of his own. Hence the hirer of a thing, being responsible only for that degree of diligence which all prudent men

use, that is, which the generality of mankind use, in keeping their own goods of the same kind, it is very clear he can be liable only for such injuries as are shown to come from an omission of that diligence; or, in other words, for ordinary negligence. If a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food; and if he does so, and the horse, in such reasonable use, is lamed or injured, he is not responsible for any damages. Story on Bailments, 391, 392. 4 Barn. & Ald. 21. 3 Esp. R. 79. 5 Miller's Louisia. R. 7, 9.

Now, test the verdict by either of these principles, and we are satisfied that it was warranted by the testimony. The Jury were authorized to find, that there was a special contract of hiring, and that the death of the slave resulted from his being used for a different purpose from that intended by the parties, or else, that the loss ensued from gross negligence on the part of the Council. The want of discretion in our slave population is notorious. They need a higher degree of intelligence than their own, not only to direct their labor, but likewise to protect them from the consequences of their own improvidence. From the testimony of Toney, it is manifest that, considering the locality and nature of the soil, &c. the situation of the slave was one of imminent risk and exposure. We are, therefore, satisfied with the verdict.

Let the judgment be affirmed.

GRAVES ET AL. v. MOSES ET AL., 13 Minn. 335.

(1868)

Appeal by defendants from an order of the district court, Olmsted county, denying a new trial.

BERRY, J. The complaint in this case alleges that the plaintiffs let to hire and delivered to the defendants, to be driven and used by them, a stallion, mare, harness, and carriage, and that the defendants so immoderately drove and improperly cared for the mare that she became sick and died. The complaint is not as clear and definite as it might be, but the action is evidently based upon the alleged contract of the defendants, and damages are asked for its breach. This appears to be the construction put

upon the complaint by the counsel for both parties. Among the engagements of a party taking a thing to hire are to use it well, to take care of it, to return it, and to pay the price of hire. Edw. Bailm. 312, Harrington v. Snyder, 3 Barb. 381. And even if these engagements are not express, the law implies them; and a breach of any of them is a breach of the contract between the letter to hire and the hirer. * * * If the hirer, in a case like this at bar, fails to pay for the use of the thing hired, to use it well, to take due care of it, for all these failures the letter to hire is entitled to damages. If the bad usage or want of care produce the death of a horse hired, as alleged in this case, the value of the horse may be recovered. And as the party injured "can charge the delinquent party only for such damages as by reasonable endeavors and expense he could not prevent," (2 Greenl. Ev. § 261; Sedg. Dam. 94, 95,) he is required, in case a horse let to hire be made sick by the misconduct or neglect of the hirer, to use all reasonable exertions to cure him and prevent his death. The expense to which he is put, and the trouble and attention which he is obliged to bestow for this purpose, are occasioned by the breach of the hirer's engagement, and are natural and proximate damages resulting from it, and for these also he is entitled to recover. Vanderslice v. Newton, 4 N. Y. 133. And although the complaint is certainly open to criticism, we think it substantially sets out all these grounds of damages, general and special. It appears that the mare having fallen sick on the road, the defendants left her at one "Woodard's," 12 miles out of Rochester, (where the team was let and the plaintiff resided,) and that one of the plaintiffs went to "Woodard's" to see her on two occasions, and on the last brought her home. One of the plaintiffs, being on the stand, was asked: "What was it worth for yourself and team going to Woodard's?" The question was objected to as irrelevant, but we think it was properly asked. The plaintiffs had the right, and perhaps it was their duty, to go and see the mare, and to attend to her and to bring her home. This was part of the care and attention and expense which are set up as ground for special damages in the complaint. As to the objection made to this question, as well as others, on the ground that the mare is valued in the complaint at $350, while the whole amount of damages claimed is only $350, and that, therefore, no damage is claimed for anything but the

value of the mare, it is possible that this discrepancy might have been considered below in a motion to make the complaint more definite and certain, but we shall not consider it here. It is plain enough that the plaintiffs were seeking damages beyond the value of the mare, though they may not have asked for it by the most accurate pleading. One of the plaintiffs' witnesses was asked as to the value of the use of the stallion, wagon, and harness per day, and the question was objected to as irrelevant. We do not perceive how this question could have prejudiced the defendants. If the plaintiffs were satisfied with a part of the price for the use of the team let, the defendants have no reason to complain because the whole price is not demanded. George C. Cook, a witness called by defendants, testified in substance that he had kept a livery stable in Rochester nine years, and had known the mare in question ever since she had been brought there. He was then asked to "state whether or not this mare was a proper animal to be used and let for the purposes of a livery stable, and to be driven off on a hunting excursion." The court excluded the testimony sought to be introduced, on the ground that the witness did not "show himself sufficiently acquainted with the mare." We think this was right. The witness might have known the mare by sight, to use a popular expression, and yet have no means of forming an opinion upon the subject of the inquiry.

There are several other reasons why the question was properly excluded. The answer sets up no other unfitness of the mare for the purposes for which she was hired except that she was sick, so that an inquiry as to general unfitness was too broad, and outside of the issues. For the purpose of showing that Hammond, one of the defendants, was no party to the contract of hiring, the defendants' counsel proposed to prove that he (Hammond) was invited by the defendant Moses to go on the excursion as his friend and guest, and that on giving the invitation Moses said to him: "Go with me on this fishing excursion as my friend. It shall not cost you a cent. I have already engaged a team of Graves to go, and there is a seat for you." The evidence was excluded, but we are of opinion that it should have been admitted. This action is upon an alleged contract, and Hammond cannot be held for the breach of it unless he was a party to the contract. As there appears to be no direct evidence of an actual hiring by him, but his character as a hirer is left to be

inferred from the fact that he accompanied the other defendants, and took charge of the team, we think it was proper for him to rebut this inference by showing that he went as a guest of other parties, who were the actual hirers of the team. * * * The court charged the jury that "the plaintiffs would also be entitled to recover what you shall find from the evidence to be the value of the use of the team while defendants had it and the value of plaintiffs' service in going to Woodard's twice, and the value of the service done by plaintiffs in taking care of the mare while sick, including the value of the service by the farriers on the day before she died." If the services were performed and expenses incurred in making reasonable exertions to cure the mare and prevent her death, this is in accordance with the views expressed in the early part of this opinion.

The court further instructed the jury that "if they should find from the evidence that the defendants undertook to take special and extra care of the mare, then the defendants are chargeable with such extra diligence, and if they failed to bestow such diligence, and in consequence of that neglect the mare died, then the jury will find a verdict as before directed;" that is, for the plaintiffs, for the value of the mare, etc. As there is no allegation in the complaint that the defendants agreed to take special or extra care of the mare, nor any claim for damage for want of such care, and, as claimed by the plaintiffs' counsel, the plaintiffs on the trial appear to have relied upon the implied obligations of the defendants, we think this instruction was not called for by the case. * * *

This action is brought upon the contract of hiring, and it is for the breach of the obligation which the law imposes upon a hirer that a recovery is sought. If Hammond was not a party to the contract he is not liable for its breach, and in an action upon the contract his carelessness and negligence, though producing damage to the plaintiffs, are unimportant.

The order refusing a new trial is reversed.

MAYNARD ET AL. v. BUCK, 100 Mass. 40.

(1868)

Contract for the value of a pair of steers alleged to have been lost through the defendant's negligence. At the trial in the su-

perior court, before Rockwell, J., the jury found for the plaintiffs.

Upon a new trial, before Reed, J., there was evidence substantially as at the former trial concerning the receipt of the cattle on the morning of Wednesday, November 9, by the defendant at Brighton; and it appeared that when he received them he entered a memorandum of the receipt in a book in which he made similar record of all the cattle which were to compose his drove, and placed them, unwatched, in the furthest of three yards in which the drove was contained; that afternoon, half an hour before he was to start, he sent a person to count the number of cattle in that yard, who reported that there were thirteen, which was the number he had placed there; that when he started he first turned the cattle out of the other yards, and as they passed the third yard he let out the cattle which were in it, and when doing so saw that there were a pair of gray steers among them which did not belong to his drove, and accordingly turned them into an adjoining yard, but did not count the rest; that the drove consisted of one hundred and twenty-three cattle, and he had two men and a boy to assist him in driving; that he had reached Newtonville about half past five o'clock, when the stampede was caused by the railroad train; that he gathered the drove again, and went on as far as Newton Lower Falls, where he stopped for the night; that he counted the drove in the morning, and found nine cattle missing, and then proceeded to Worcester where he arrived on Friday evening, November 11, but did nothing towards the recovery of the missing cattle from the time of discovering their loss until Saturday, November 12, when he returned to Brighton and made some search for them, the nature and extent of which he related as a witness.

The jury again found for the plaintiffs; and the defendant alleged exceptions, which were argued at October term, 1869.

WELLS, J. The instruction that the defendant "was bound to use the same care in regard to" the cattle, which he undertook to drive for hire, "that men of ordinary prudence would exercise over their own property under the same circumstances," was correct, and in accordance with numerous authorities. Cayzer v. Taylor, 10 Gray, 274. Shaw v. Boston & Worcester Railroad Co. 8 Gray, 45, Shrewsbury v. Smith, 12 Cush. 177. Sullivan v. Scripture, 3 Allen, 564. Giblin v. McMullen, Law Rep. 2 P.

C. 317. The degree of care to be required of one who is entrusted with the property of another for reward is not less than that which is to be expected of one who deals with his own property. If the first instruction asked for is based upon a recognition of such an obligation, it is only equivalent to that which was given by the court. But if the comparison with those "engaged in driving cattle for hire" was intended to indicate that one who drives for hire is bound to a less degree of care "because he is an hireling and careth not" for his charge, it asked for a rule which has never been recognized either as good law or good morals. The evidence as to the usual practice or mode of proceeding ordinarily adopted by drovers was held at the previous hearing to be admissible upon the question of ordinary care, because it tended to show what had been found, by the experience of others, to be most judicious or expedient in like emergencies; not because they were drovers for hire as distinguished from owners driving their own cattle.

The defendant further insisted that the jury should be instructed that, "if he did not do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action." But this is not the legitimate application of evidence admitted to show the usual practice in similar cases. The usual practice is made up of particular instances of conduct, by the limited number of individuals similarly engaged, within the knowledge of the witnesses who may be called to testify. That which is admissible in evidence is, not the particulars, but what the witnesses state from their knowledge of those particulars to be usual, or the course ordinarily pursued. The character for prudence, of those whose conduct or acts go to make up this usual practice, is not required to be shown. It forms no part of the inquiry. The effect and purpose of the evidence is to aid the jury in forming their judgment of what the party was bound to do, or was justified in doing, under all the circumstances of the case. What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard

to the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done, from which, together with all other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable. We think the instruction asked for, in this particular, was not such as should have been given.

The instruction asked for, to the effect that "the defendant was not obliged to make any outlay disproportionate to the compensation he received, to recover cattle that had strayed from the drove without his negligence," and therefore that the price he received was "to be taken into account" upon the question of due diligence, was inadmissible. The price is undoubtedly graduated by the well known risks of the business, and accepted in view of these risks. The obligation to seek the recovery of straying cattle does not rest upon the ground that that special service is paid for in the consideration of the original contract to which it is incident. It arises because it is incident to the principal contract, and, as such, is covered by its consideration. When an emergency occurs to bring that obligation into operation and make it onerous, he is not justified in any lack of faithful performance because in that particular event his compensation has proved inadequate to the burden.

The fifth instruction requested is correct, and unobjectionable, if taken to mean only that the jury must find both neglect and that the loss occurred by reason of such neglect. But that instruction was, in effect, given. To have given it in the form asked was unnecessary; and might mislead, by seeming to require the jury to determine, with too much precision, to which particular act or omission the loss should be attributed, when they might think there were several which co-operated to produce the result. * * *

Upon the whole case the court are of opinion that there is no sufficient ground shown for setting aside the verdict.

Exceptions overruled.

RUSSELL v. KOEHLER, 66 Ill. 459.

(1872)

Appeal from the Superior Court of Cook county; the Hon. William A. Porter, Judge, presiding.

MR. JUSTICE THORNTON delivered the opinion of the Court:

The defendant claimed, as a set-off to the notes and account sued on, the value of his carriage, which had been entrusted to plaintiff for repairs, and was destroyed by the fire which prevailed in Chicago in October, 1871.

The bailee took the carriage to repair, and as the contract was one of mutual benefit, only ordinary care was required of him. This is defined to be such care as a person of ordinary caution would exercise in regard to the property. No ordinary prudence could guard against or prevent the destruction of property during a calamity so fearful as the fire in Chicago in October, 1871.

As to the existence of any special agreement to repair the carriage in a specified time, the testimony is extremely conflicting. There is evidence to sustain the verdict, and there is no sufficient ground to set it aside.

Even if true, that the plaintiff said he would retain the possession of the carriage as security for the defendant's indebtedness to him, this would not make the plaintiff liable for the loss. The defendant, upon demand and tender of any expense incurred in repairing, could have regained the possession. When the carriage was permitted to remain with the manufacturer, the jury had the right to presume that the continued possession with the bailee was with the consent of the owner.

We are of opinion that the verdict was right, and affirm the judgment.

Judgment affirmed.

SPOONER v. MANCHESTER, 133 Mass. 270.

(1882)

Trover for a hired horse. Judgment for plaintiff below.

FIELD, J. This case apparently falls within the decision in Hall v. Corcoran, 107 Mass. 251; 9 Am. Rep. 30, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when after traveling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when as in this case the property has been returned to and received by the owner by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. Perham v. Coney, 117 Mass. 102.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him by relation as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action

of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In Spooner v. Holmes, 102 Mass. 503; 3 Am. Rep. 491, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. Fouldes v. Willoughby, 8 M. & W. 540, is a leading case, establishing the necessity in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also Simmons v. Lillystone, 8 Exch. 431; Wilson v. McLaughlin, 107 Mass. 587.

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: Wheelock v. Wheelwright, 5 Mass. 104; Homer v. Thwing, 3 Pick. 492; Lucas v. Trumbull, 15 Gray, 306; Hall v. Corcoran, ubi supra. In each of these cases, there, was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In Wellington v. Wentworth, 8 Metc. 548, a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured here, during the season with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive

him of her there can be no doubt that it would have been a conversion.

Parker v. Lombard, 100 Mass. 405, and Loring v. Mulcahy, 3 Allen, 575, were both decided upon the ground that the defendant either assumed to dispose of the property as his own, or intended to withhold the property from the plaintiff.

Nelson v. Whetmore, 1 Rich. 318, was an action of trover for the conversion of a slave, who, traveling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In Gilmore v. Newton, 9 Allen, 171, 85 Am. D. 749, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercise acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. Fouldes v. Willoughby, ubi supra; Wilson v. McLaughlin, ubi supra; Nelson v. Merriam, 4 Pick. 249; Houghton v. Butler, 4 T. R. 364; Heald v. Carey, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he

had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion. * * *

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

Exception sustained.[1]

EATON v. LANCASTER ET AL., 79 Me. 477; 10 Atl. 449.

(1887)

Action on the case to recover damages for the loss of a horse destroyed by fire in the stable of the defendant. The presiding judge ordered a nonsuit after the plaintiff's evidence was introduced, and the plaintiff alleged exceptions.

LIBBY, J. On the eleventh day of July, 1885, the defendants were livery-stable keepers in Belfast, and on that day the plaintiff's horse and harness were delivered to them at their stable to be kept for hire for an indefinite time. In the night of that day the stable took fire from some cause, and the plaintiff's horse, and all the horses in it, but one, were burned. About 1 o'clock in the night three men, McCabe, Twombly, and Casey, drove into the stable a team belonging to the defendants, which they had been using. They were to some extent intoxicated. After the team was put up they went into the loft of the stable which was full of dry hay, to stay during the night. About half an hour after the stable was on fire in the loft, and Twombly and Casey were burnt in it, McCabe escaping slightly burned. McCabe and Twombly were servants of the defendants, employed in their stable during the day, but were not on duty that night, and were not doing any act for the defendants. One McIntosh was a servant of the defendants, and that night was

[1] The gist of the action of conversion lies in the interference with the plaintiff's possession or right to it, amounting to a complete denial for an appreciable time. Not every intermeddling is a conversion, nor indeed every intermeddling contrary to the terms of the bailment. There must be some act which can be interpreted as a total deprivation of the plaintiff's possession or right to it, not consented to by him. 8 Harv. L. Rev. 280.

Cf. Farkas v. Powell, 86 Ga. 800.

charged with the duties of night watch, and the general care of the stable. One of the regulations of the defendants for the care and management of the stable, was that no one should be permitted to sleep in the loft during the night. McIntosh knew that the three men were smokers, smoking pipes, and were in the habit of carrying their pipes and matches with them.

The plaintiff claims that he made out his right to recover on two grounds: First, that the fire was set to the stable carelessly by the three intoxicated men, two of whom were then in the employ of the defendants. Second, that the three intoxicated men were permitted by McIntosh, the night watch, to go into the loft to sleep, and that that act was not the exercise of due care over the plaintiff's property, and that by reason of that careless act the stable was burned, and the plaintiff's horse and harness were destroyed.

By the contract of bailment the defendants were bound to exercise ordinary care over the plaintiff's property,—that degree of care which prudent and careful men would exercise over their own property under the circumstances. They were liable for the negligence of their servants in the performance of any duty in regard to the care and custody of the plaintiff's property, within the general scope of their own employment.

As to the first ground of the plaintiff's claim, we think it entirely fails, as neither of the three men were in the performance of any act for the defendants during that night, but were acting as they pleased for their own pleasure.

Upon the second ground of the plaintiff's claim there is more doubt. The plaintiff's claim is that McIntosh permitted the intoxicated men to go into the loft for the night; that this was within the scope of his general employment, and in the performance of his duty as night watch; that it was a careless, negligent act on his part for which the defendants are responsible, and was the proximate cause of the loss of plaintiff's property. These propositions are all controverted.

The first fact embraced in this ground of claim is that McIntosh permitted the three intoxicated men to go into the loft to sleep for the night. The burden is on the plaintiff to prove it. The only direct evidence in regard to it comes from McIntosh. He says the men went up in his presence; "They came into the office where I was before going up to lie down up-stairs;

they then stepped out of the office and went across the barn floor to go up into the loft, and did go up into the loft—a hay loft—loose hay in it; should say the loft was sixty to seventy-five feet long and perhaps thirty-five feet wide. It was full of dry hay." "Question. Did you make any objections to their going up into the loft? Answer. I did. I told them I should not go up there; says I, 'Boys, you better go up and lie down with me; there is plenty of room upstairs.'" He further said he never knew them to go up there and lie down before; he knew it was against the rules. McCabe, one of the three men who went up was a witness, but did not testify upon this point. This was all of the evidence as to what McIntosh did to prevent their going. Might the jury infer his consent from his testimony and the surrounding circumstances? We think they might. True, he says he objected; but when he states what he said to them, it appears more like advice, feebly expressed. He does not state their answer. He did not tell them they must not go, it was against the rules; nor did he interpose, nor attempt to interpose any force to stop them. They appear to have been friendly to him, two of them fellow-servants, working with him by day; and it is fair to presume that they would not have needed any vigorous objections on his part; but as soon as they went into the loft he went to his sleeping place and went to sleep. He was not a willing witness against the defendants, was still in their employ, and testifying to sustain his own conduct. The jury might well infer that, if he objected at all, his objection was of the character which is equivalent to consent. Was permitting them to go into the hay loft in their then condition, knowing that they were smokers, and carried their pipes and matches with them, to stay during the night, a want of due care? This was a question of fact for the jury, and we think that they might properly so find. It may be assumed that the defendants thought so, as, by one of their rules, they had forbidden it.

Are the defendants responsible for this negligent act of their servant McIntosh? We think so. It was an act directly in the line of his duties. Here the negligent act is directly within the line and purpose of McIntosh's employment. It is more like Whatman of his duty as a night watch, in charge of the stable. The fact that his negligence was in violation of the defendants' orders, if it

was within the general scope of his duties, does not relieve the defendants from responsibility. The case is not like Williams v. Jones, 3 Hurl. & C. 256, 602, 33 Law J. (N. S.) Exch. 297, to which our attention is called, where a carpenter was employed by A. with B.'s permission to work for him in a shed belonging to B., and the carpenter set fire to the shed in lighting his pipe with a shaving. His act, though negligent, had nothing to do with his employment as A.'s servant, and was not within the general scope v. Pearson, L. R. 3 C. P. 422, where a carpenter having an allowance of an hour's time for his dinner in his day's work, but also having orders not to leave his horse and cart or place where he was employed, happened to live hard by, and contrary to his instructions, he went home to dinner and left his horse and cart unattended at his door. The horse ran away and did damage to the plaintiff's railings, and the master was held liable.

The remaining inquiry is, was the negligence of McIntosh the proximate cause of the loss? The rule, as claimed by the counsel for the defendants, is that injury must be such as according to common experience and the ordinary course of events might reasonably be anticipated. Admitted; and then it is a question for the jury. We think the jury would have been authorized to so find. To what extent the men were intoxicated was a fact for the jury. If to the extent to deprive them, substantially, of the use of their mental and physical powers, and they were in the habit of smoking, carrying matches for a light, might not in fact what occurred have been "reasonably anticipated?" If it was negligent to let them go into the loft to stay under the circumstances, it must have been on account of danger from fire. There appears to have been no other danger to be apprehended. The negligence involved was permitting them to go into the loft to sleep. If, in their condition, they were a dangerous element there, the defendants must be held responsible for their acts. The case is the same in principle as where a railroad company, through its agents or servants, knowingly or negligently permits an intoxicated man to enter its cars among the general passengers, and, from intoxication, he commits an assault upon a peaceable passenger; in such case the company is liable. True, the degree of care required in the two cases is different; but, as far as the test of proximate cause is involved, the principle is the same. Exceptions sustained.

AMERICAN DISTRICT TEL. CO. v. WALKER, 72 Md. 454.

(1890)

ALVEY, C. J. This action was brought by the appellee against the appellant to recover for injury to a pair of horses, and to a surrey wagon, a vehicle to which the horses were attached at the time of the accident. The question is, whether the defendant is responsible for the consequences of the accident.

The defendant is a corporation, and it appears that it holds itself out for the undertaking of the performance of various services, such as the carriage of parcels, messages, and other errands and commissions, upon call at district stations in the city. The corporate name of the defendant would not appear to indicate very clearly the nature of the duties that it assumes to perform.

It appears that the plaintiff was the owner of a pair of valuable horses, which he kept at Little's livery-stable, on Howard Street; and having the horses hitched to a surrey wagon hired of the proprietor of the livery-stable, for a drive in the country, upon his return he and his companions stopped at a restaurant on the corner of Calvert and German streets; and desiring to have the horses and vehicle taken to the livery-stable, he went to the nearest district office of the defendant and asked for a boy competent to drive a pair of horses to Little's stable, on Howard Street, and paid the customary charge for a messenger service. * * * The boy started off with the team, but on the way to the stable, the horses ran off, threw out the boy, broke up the vehicle, and one of the horses was so seriously injured that he had to be shot, and the other horse was rendered unsafe to drive. There was evidence given tending to show that the running away of the horses was caused by the negligent or unskillful driving of the boy. It would appear that the furnishing of boys to drive teams for customers was part of the ordinary business of the defendant; for Little, the keeper of the livery-stable, testified that the defendant had a call-box in his stable, and that he frequently called messenger-boys of the defendant to drive teams, and they were supplied, and that he settled for such service monthly.

There was evidence offered by the defendant for the purpose of proving previous knowledge on the part of the plaintiff of a limitation as to the extent of damages for which the defendant

would contract to be answerable for any injury that might be sustained in the course of its service. Such condition was printed at the foot of its blank delivery tickets. But it was not shown that there was any contract in this case, by ticket or otherwise, containing any such limitation of liability, and the evidence offered was therefore rejected, and we think properly so.

Upon the whole evidence, the court instructed the jury, upon request of the plaintiff, that if they found from the evidence that the defendant undertook, for a reward, to deliver the team of horses and vehicle, as described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking intrusted the driving of the team to one who, by his negligence permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff was entitled to recover, and the jury should allow such damages as they might find, from the evidence, the plaintiff suffered by reason of the defendant's default in the premises.

The defendant * * * also moved the court to exclude from the jury all the evidence on the part of the plaintiff which related to the injury of the surrey wagon, and the expense incurred in repairing the same. And to the refusal of its prayers, and the motion to exclude the evidence, as well as to the instruction given by the court to the jury, the defendant excepted.

This is a case of bailment for hire; but the defendant did not, by its undertaking, incur the liability of a common carrier. This species of bailment is included in what Lord Holt, in the leading case of Coggs v. Bernard, 2 Ld. Raym. 917, classifies as the fifth sort, viz., "a delivery to carry or otherwise manage, for a reward to be paid to the bailee," and as to which, said Lord Holt, the cases are of two sorts, "either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events." But as to the second sort he says "they are bailiffs, factors, and such like," in which case the bailee is only bound to take reasonable care; and "the true reason of the case is," says the learned judge, "it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it." And so Judge Story, in his work on bailments, section 457, founding

his text principally upon Lord Holt's classification, states the same distinction. He says: "Every such private person is bound to ordinary diligence, and to a reasonable exercise of skill; and of course he is not responsible for any losses not occasioned by the ordinary negligence of himself or his servants. He will not, therefore, be liable for any loss by thieves, or for any taking from him or them by force, or where the owner accompanies the goods to take care of them, and is himself guilty of negligence. This is the general rule; and it of course applies to all cases where he has not assumed the character of a common carrier, unless, indeed, he has expressly, by the terms of his contract, taken upon himself any such risk." The application of the principle of this species of bailment, and the extent of the liability of the bailee, are well explained and illustrated by the cases of Newton v. Pope, 1 Cow. 109; Brind v. Dale, 8 Car. & P. 207; and Searle v. Laverick, L. R. 9 Q. B. 122; and those cases show that if negligence or want of skill in the bailee or his servant be the ground of action, the *onus* of proof is on the plaintiff.

The instruction granted by the court is based exclusively upon the alleged negligence of the boy in driving the horses. There was evidence tending to prove such negligence, and we perceive no error in the instruction. The boy was furnished from the defendant's office to take charge of and to drive the team of horses to the livery-stable, and having assumed the duty for a reward, the defendant was bound to furnish a driver both competent and careful.

Nor do we perceive that there was any error committed by the court in refusing to exclude from the consideration of the jury the evidence in regard to the damage done to the surrey wagon, and the expense of its repair. It is true, the plaintiff was not the general owner of the wagon, but having hired the vehicle, he was bailee, and as such he had a special property in it, which entitled him to recover for any injury to it, as against a party without title. He was answerable to the general owner, and was therefore entitled to recover of the defendant to the full extent of the injury to the vehicle caused by the negligent act of the defendant's servant: Harker v. Dement, 9 Gill, 7, 13; 52 Am. Dec. 670. * * *

The judgment must therefore be affirmed.

SULPHO-SALINE BATH CO. v. ALLEN, 66 Neb. 295; 92 N. W. 354.

(1902)

Action in nature of special assumpsit by bailor against bailee for hire. Tried below before Holmes, J. Judgment for plaintiff. Defendant brings error.

DUFFIE, C. The plaintiff in error operates a bath-house in the city of Lincoln, having among its other attractions a plunge bath. In the office where tickets are sold is a system of drawers or boxes in charge of an attendant who presents one of them to any patron having valuables about his person, in which the valuables are deposited, the box returned to its proper place and locked, and the key given to the patron. After taking his bath the visitor returns the key to the attendant, who unlocks and presents the drawer to the visitor, who, in this way, regains possession of such valuables as he may have deposited. On the evening of July 21, 1900, Allen, the defendant in error, visited the bath-house, in company with one Chase, for the purpose of getting a bath. On purchasing tickets, the attendant presented a box to each of them, in which they deposited their valuables, received the keys to their respective boxes, passed into the bath-room, each taking a separate dressing room, where they disrobed, and afterward enjoyed their bath in the plunge. Allen testifies that he placed the key given to him in his coat pocket and that on returning to his dressing room he noticed that his clothing had been disarranged by some one during his absence in the bath, and his key was missing. He immediately notified the attendant from whom he had received the key, and was told that his property could not be returned until the managing official opened the boxes. The next morning he called at the bath-house and had a talk with the manager, who told him that his key had been turned in, and that his property was gone; that detectives had been employed; and requested him to call again a day or two later. The second day thereafter Allen again called upon the manager, and was told that nothing further had been learned, and, on Allen's demand to be paid the value of his property, payment was refused. This action was thereupon commenced to recover the value of the de-

posit, which, in his petition, Allen alleges was a gold watch of the value of $45, and currency to the amount of $116.

The answer is as follows:

"For answer to the petition of the plaintiff defendant admits that on or about the 21st day of July, 1900, plaintiff came to the defendant's bath-house to take a swim in its swimming pool; that before he went into said pool he without any request from defendant placed in a drawer at defendant's counter certain effects the kind, character and value of which if the same had value defendant was not at any time informed or advised, which drawer was securely locked and the key was then and there delivered to plaintiff who took the same away with him. Plaintiff never returned said key nor is defendant aware what disposition he made of it.

"Defendant denies each and every allegation and averment in the petition contained not hereinbefore specifically admitted.

"Wherefore defendant prays to be hence dismissed with costs."

We think the evidence fairly establishes the fact that a custom prevailed at the bath-house of inviting its patrons, when they purchased a ticket entitling them to a bath, to place their valuables in one of the boxes described. That this made the company a bailee of the property, cannot be doubted. The evidence shows that the house had many patrons, that the dressing rooms were not provided with locks, thus rendering it necessary that some place should be provided for the safe-keeping of such valuables as visitors might have about their person while taking a bath.

In Woodruff v. Painter, 16 L. R. A. (Pa.), 451, a retail dealer in clothing was sued for the value of a watch which, at the direction of a clerk, he had placed in a drawer while trying on a suit of clothes. The court said (page 452): "When the defendants opened a retail clothing store they thereby invited the public to come into their place of business and purchase clothing in the usual manner; and when they extended this invitation they assumed some duty to the people who should respond to it. Even the householder who permits the use of a path leading to his house is deemed to hold out an invitation to all people who have any reasonable ground for coming thither to pass along his pathway, and is therefore held responsible for neglecting to fence off dangerous places. 1 Addison, Torts, 203. So, too, a shopkeeper is liable for neglect on leaving a trap-door open without any pro-

tection by which his customers receive injury. Parnaby v. Lancaster Canal Co., 11 Ad. & El. (Eng.) 223. In like manner it cannot be doubted that, if these defendants had maintained or permitted a danger of any kind in their store, and by reason of it the plaintiff had sustained bodily injury, they would have been answerable to him for the consequences. In such case they would be said to have been guilty of negligence,—guilty of a neglect of duty which they owed to the customer; but I apprehend that the duty neglected would arise from an implied contract that, if customers would come to their store, no harm that could reasonably be averted should overtake them, and the consideration for such promise would be the chance of profit from their patronage. Upon principle the contract must be held to extend to the safety of such property as the customer necessarily or habitually in pursuance of a universal custom carries with him. Whatever thus necessarily, or in common with people generally, he habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and, having laid it aside upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And, this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer. This much was assumed without question in Bunnell v. Stern, 122 N. Y., 539, 10 L. R. A., 481, a case differing from the present in this only: that the article lost was a lady's cloak, and the saleswoman took no care whatever of it. Assuming that the jury would have found that a watch is such personal belonging as men usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person, and lay it aside; and, further, that the plaintiff, by direction of the defendants' salesman, placed his watch in a designated drawer in the store, preparatory to the selection of a suit of clothes, to purchase which he visited the store,—the defendants thereby became chargeable as bailees. The principles which govern that relation are briefly and clearly stated by Judge Story, in his work on Bailments, thus: 'When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the

bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or eo nomine, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident. It was upon this principle that Lord Holt said, in Lane v. Cotton, 12 Mod. (Eng.), 473, 483, an action was sustainable against an innkeeper for the loss of a guest's goods, and that the court of appeals affirmed the judgment of the court of common pleas of the city of New York in Bunnell v. Stern, supra."

The answer of the company, a bailee for hire, is peculiar. While admitting the receipt of the property, or of some property, there is no plea that ordinary care was exercised in its preservation or that it was lost or taken from the possession of the company without negligence on its part; and the evidence on the part of the defendant below is more barren than its plea. We have searched the record in vain for any testimony as to what became of the property. So far as the record discloses, it may still be in the company's possession. The only evidence in the record that the property was claimed and taken by some third party is a statement made by Allen, that during one of his calls the manager told him that the key had been turned in and that the property was gone. This statement, not under oath, cannot be taken as evidence of the fact, especially when we consider that the manager and his clerk both testified on the trial, and made no attempt to show that the property was taken by a third party. Having received the property as bailee, the burden was on the defendant below to show that it was lost, if such was the case, without negligence upon its part. * * * The whole theory of the defense, as we gather it both from the answer and from the testimony offered by the defendant, was that it was under no obligation to return the plaintiff's property until he had returned the key of the box in which it had been deposited. No time need be spent in demonstrating the unsoundness of such a defense.

If the company is still in possession of the plaintiff's property, or if it has been lost because of its want of ordinary care in its preservation, it must answer in damages for its value, even though the plaintiff below is unable to return the key through its being lost or stolen from him. * * *

BY THE COURT: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

LICHTENHEIM v. THE BOSTON AND P. R. R. CO., 11 Cush. (Mass.) 70.

(1853)

Assumpsit to recover the value of a case of merchandise. The plaintiff claimed to charge the defendants only as warehousemen. The case was admitted to have been transported by the defendants over their railroad from Providence to Boston, and to have been received at the depot in Boston on the 18th of March, 1850; that it was called for on the 18th of April following by the plaintiff's agent, and could not then be found.

The jury found a verdict for the defendants, and the plaintiff excepted to the above rulings. * * *

DEWEY, J. 2. The further question is one of more importance. It arises upon a prayer for instructions to the jury that the burden of proof was on the defendants to show not only the loss of the goods from their warehouse, but the manner of their loss. The court so far adopted the prayer as to rule that the burden of showing the loss of the articles from their custody, and that such loss had not been occasioned by any want of ordinary care and diligence on their part, was on the defendants. The court, however, further ruled that they were not bound to show the precise manner in which the loss occurred, but that if unable to do this, they might exonerate themselves from that burden, by clearly showing that the loss did not happen from any negligence or want of care on their part. This, taken with the qualifications, is unobjectionable. But generally the carrier would have to show some mode in which the loss occurred, to sustain the burden on him, and establish the fact that the loss had not happened through his negligence. To hold as an abstract proposition that he must in all cases show the precise manner in which the goods

were taken from him, or destroyed while in the warehouse, might in some cases charge him unreasonably.

3. We had more doubt at the argument upon another part of the instruction, namely, "if the article was taken by mistake from the depot, and the defendants exercised ordinary care in the matter, they would not be responsible." That doubt arose from the apprehension that this ruling might be taken to convey the idea that if the goods, while in the warehouse of the defendants, were taken away by a third person as his own, through mistake, although in the presence of the agents or servants of the warehousemen, and with their knowledge, but without a manual delivery by them, the defendants would not be liable therefor, if in their general care and supervision of their warehouse, they were guilty of no want of ordinary care and negligence.

As a matter of law, it must be held in a case like the present, that if there had been an actual delivery by the warehouseman of the goods to a third person by mistake, the warehouseman would be liable for the goods, and any attempt to show he was in the exercise of ordinary care and prudence, would be unavailing. Such delivery to a third person, overrules all such grounds of excuse, and charges the warehouseman. And this seems to have been substantially stated by the presiding judge in the subsequent part of the instructions, where he says, "but if the agent of the defendants delivered it by mistake to a wrong person, the defendants would be responsible." We think, upon a proper construction of the whole charge, it must be understood that the defendants were to be charged in case there had been on the part of their agents a delivery to a third person, either actual or permissive. It would be a delivery for which the warehouseman would be chargeable to the owner, if by his silence, being present and knowing the same, he permitted the act of a third person, who should take the goods into his possession, and remove the same from the warehouse. Such permissive delivery, although entirely by a mistake as to the person, and under the supposition that he was the true owner, would not be the less a default of the defendants.

Taking the charge together, we understand the instruction to be, that if the article was taken by mistake by a third person from the depot, without the knowledge or implied assent of the

warehouseman or his agents, the defendants, if they could show that they had in fact exercised ordinary care and diligence as to the custody of the goods, would not be responsible. If this be a correct view of the instructions, we perceive no sufficient ground for setting aside the verdict.

Exceptions overruled.

FIFTH NATIONAL BANK v. THE PROVIDENCE WAREHOUSE CO., 17 R. I. 112.

(1890)

Assumpsit. Heard by the court, jury trial being waived.

STINESS, J. Alverson, a produce dealer in Providence, borrowed of the plaintiff the sum of $1,950, upon a warehouse receipt of the defendant which read as follows:—

Providence Warehouse Co.

Providence, September 28, 1888.

No. 5175 Marks,	Received on storage of C. F. Alverson & Co., subject to the order of the Fifth National Bank, three hundred and ninety (390) cs. eggs. To be delivered according to the indorsement hereon, but only on the surrender and cancellation of this receipt, and on payment of the charges payable thereon.
Stored in Section B.	S. J. Foster, Mgr.

Across the face of the receipt was the word "Negotiable."

There were no distinguishing marks on the cases of eggs, and none noted in the margin of the receipt; but the eggs were placed by themselves in the defendant's loft. Alverson had other eggs in the warehouse, some of which may have been stored with these; but this lot was specially known to the manager and servants of the warehouse, from the fact that a portion of it got wet when the defendant was putting it into the warehouse.

November 1, 1888, the defendant delivered these eggs to Alverson, describing them by the receipt number, 5175, receiving the storage fees and giving the receipt therefor afterwards. The plaintiff sues to recover the value of the eggs. The defendant contends that having kept other cases of Alverson's eggs, sub-

ject to the plaintiff's order, it had the right, in the absence of distinguishing marks, to deliver the eggs stored under this receipt, and hence is not liable for such delivery without the plaintiff's order. To support this proposition the defendant cites the following cases: Dole v. Olmstead, 36 Ill. 150, 85 Amer. Decis. 397, and 41 Ill. 344; 89 Amer. Decis. 386; Preston v. Witherspoon, 109 Ind. 457; Rice et al. v. Nixon, 97 Ind. 99; and National Exchange Bank of Hartford v. Wilder, 34 Minn. 149.

These are cases where grain was deposited, according to usage, in common bulk. * * * It is obvious that grain in an elevator is practically incapable of distinction, and can hardly be stored without commingling. But it is not so with merchandise packed in cases. Jones on Pledges, § 318. The warehouseman can place them in separate lots, or he can mark them with the number of the receipt. * * *

In the case before us, the eggs were delivered without an order from the plaintiff, with full knowledge that they were covered by the receipt which stipulated they were subject to the plaintiff's order. It is urged in justification that these eggs were out of cold storage, and other eggs were kept in cold storage to answer the receipt. To this the plaintiff replies that the eggs covered by this receipt were fall eggs, fresher than the others and of greater value. However, this may have been, we think it is clear that the plaintiff, under this receipt, has the right of a bailor, and is not bound to receive other property of this description in place of his own, which the bailee has intentionally delivered to another. The transferee has the right to suppose that the described property is held subject to his order. How is he to know that the warehouseman has mingled it with other like property, so as to be indistinguishable from it, if such were the case? Surely the warehouseman is bound to some degree of care and responsibility to enable him to deliver what he receives. If it is enough that he deliver anything answering the same general description, a warehouse receipt is indeed a precarious security. The delivery to Alverson, who deposited the eggs, is no defense, since by its contract the defendant assumed the obligation to deliver only upon the order of the plaintiff, knowing, from the course of business, that the plaintiff had advanced money upon the receipt. The case therefore differs, in this respect, from Parker v. Lombard, 100 Mass. 405, cited by the de-

fendant. That was a suit in trover by the holder of a receipt against the purchaser of a warehouse, who, without notice or knowledge of the receipt, and upon information given by his predecessor, had notified the apparent owners of some cotton to take it away. It was held that he was not liable to the plaintiffs for a conversion of the property. He had no contract with the plaintiff, and had been guilty of no negligence in trying to ascertain the ownership of the property. The case, however, is instructive, because it recognizes the rule that delivery to a wrong person is in itself a conversion by a bailee. Upon this point the opinion quotes the language of Mr. Justice Buller in Syeds v. Hay, 4 Term Rep. 260: "If one man, who is intrusted with the goods of another, puts them into the hands of a third person, contrary to orders, it is a conversion;" which is the claim of the plaintiff in the case at bar. Bank of Rome v. Haselton, 15 Lea, Tenn. 216, is nearer in point. There, receipts had been given for iron, not identified, from which the warehouseman had allowed the depositor to take parts, and afterwards to restore the quantity taken. In a suit between the creditors of the depositor and the holders of the receipts, the latter claimed title to the whole then there, and the court allowed it, upon the ground that in effect there had been an unauthorized loan of the iron, for which the receipt-holders could have recovered the value if it had not been replaced; having been replaced before the rights of others intervened, it inured to the benefit of the receipt-holders, who had the right to ratify and adopt the unauthorized act. Ferguson v. Northern Bank of Kentucky, 14 Bush, Ky. 555, is an elaborately considered case, which, like most of the cases on warehouse receipts, involves the question of title in the holder of the receipt. There it was held that a receipt for a number of hams procured by the owner, who had a larger number in store, without separation or distinguishing marks, carried no title for want of delivery. In criticising Kimberly v. Patchin, supra, the court suggested that as the vendor in that case thought he was selling all, the near approach to the entire quantity may have influenced the court in holding the defendant liable for conversion. The case differs from the one before us. Here there is no question of delivery: the receipt was not for part of a larger bulk, but for a specific lot, deposited at the time of the receipt, by acceptance of the bill

of lading and removal from the cars by the defendant to its warehouse.

Stewart, Gwynne & Co. v. Insurance Co., 9 Lea, Tenn. 104, is almost identical with the case at bar. There receipts were given for forty bales of cotton, "marks various," deliverable only upon the indorsement of the secretary of the Phoenix Insurance Company. Upon the failure of Vaughn, the depositor, the warehouseman notified the secretary that creditors of Vaughn were replevying the cotton then in store, and requested him to take forty bales to secure the company, or to defend the replevin suit. The secretary inquired if he had the same cotton that was on hand when the receipt was given; and upon being informed by the warehouseman that he had not, the secretary declined to have anything to do with the matter. At the maturity of the note, for which the receipt was security, the company demanded the cotton or its value and then brought suit. The court held that the receipt was a contract, vesting the right to the particular forty bales in the company. Parole testimony was offered to show that the receipt was not to cover any particular forty bales, but that the warehouseman was to keep on hand as much as forty bales, of the same value, belonging to Vaughn, subject to the receipt. This evidence was rejected, upon the ground that its effect would be to show an independent collateral agreement, contradictory of the written contract, since both contracts could not stand. The company therefore recovered the value of the cotton. So in Hale et al. v. Milwaukee Dock Co. 29 Wisc. 482, it was held that a warehouse receipt was a contract, binding the receiptor to safely store and deliver the same goods to the holder of the receipt, except in those cases where there is some express agreement or known usage of trade which shows that the parties otherwise intended. Dixon, C. J., says: "The meaning of the receipt clearly is, that the same fifty-four barrels received in the store, and described as mess pork, are deliverable or to be delivered to the bearer of the receipt, on return of the same and payment of storage; and the warehouseman, not less than the ship-owner or carrier, is bound to deliver the identical goods received, in fulfillment of the contract." Consequently the warehouseman, having delivered the same barrels which he received, was held not to be liable, although they did not in fact contain mess pork, but only salt; as he acted in good faith and was igno-

rant of the contents of the barrels. In Goodwin v. Scannell, 6 Cal. 541, the court held that the defendants, being warehousemen, and having given their storage receipt for a specific number of barrels of pork, could not set up the want of segregation to avert their liability; that by their receipt they charged themselves and were estopped; that if a warehouseman would protect himself from liability in such cases, he could do so by describing the goods as part of a larger lot and unseparated, or in bulk with the goods of others, which would give notice to any transferee of the warehouse receipt of the condition of the goods, and enable him to use necessary diligence in obtaining the title to specific property. See, also, Lichtenheim v. Boston & Providence R. R. Co. 11 Cush. 70.

We think the plaintiff's claim in this case, to hold the defendant responsible for the same goods covered by the receipt, is sustained both by principle and authority. The contract is a plain one, which must be answered according to its terms. * * *

The rule of damages should be substantially the same in either form of action. But in this case the plaintiff had only a special property in the eggs as pledgee, and, delivery having been made to the pledgor, the measure of damages is the amount of the plaintiff's loan with interest, it appearing in evidence that the value of the property at the time of the conversion exceeds that amount.

DEAN ET AL. v. DRIGGS, 137 N. Y. 274.

(1893)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 19, 1892, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action to recover damages brought by plaintiffs as transferees of two warehouse receipts issued by defendant.

The plaintiffs are brokers in the city of New York, and the defendant a warehouseman in that city. The defendant on the 28th of March, 1885, issued to one Max Von Angern two warehouse receipts similar in all respects except as to the name of the vessel

in which the merchandise was imported and the quantity which was delivered. One of the receipts reads as follows:

"M. S. Driggs & Co.'s Warehouse.

New York, March 28, 1885.

Negotiable. No. 1394. Marked ——— B C ——— 1.500 Bbls. Duty Paid.

"Received from Max Von Angern, ex Grimaldo in store 278-80 South street, to be held by us on storage, and to be delivered to his order on return of this receipt and payment of storage and charges, fifteen hundred barrels Portland cement.

Storage per month 4.
Labor.

"M. S. DRIGGS & CO."

The second receipt named the vessel Ruth as bringing the merchandise, and stated it to be 963 bbls. of cement (Portland). There had been actually delivered to the warehouseman the number of barrels of what was on each barrel described as Portland cement. as stated in the warehouse receipts.

Von Angern having obtained the receipts went with them to the plaintiffs and there executed a note for $3,500, and indorsed the warehouse receipts, and authorized the plaintiff to deliver the note and the guaranty of payment indorsed thereon by plaintiffs at his request, together with the collateral securities (the warehouse receipts) to the Chemical National Bank of New York, and to receive the proceeds of the discount of such note. The plaintiffs did so and received the moneys from the bank arising upon such discount and delivered them to Von Angern. The note was not paid by Von Angern when due and upon his default the plaintiffs paid the same to the bank because of their guaranty of payment, and took back the note and the warehouse receipts.

At the time when the plaintiffs indorsed the note at Von Angern's request, they testified that they relied in doing so upon the statement contained in the warehouse receipts, that defendant had received the stated number of barrels of Portland cement.

After the note had been paid by the plaintiffs they inquired as to the whereabouts of Von Angern, but were unable to find him and in fact he had absconded. The plaintiffs then went to the warehouse of defendant and there opened and examined a number of the barrels, and the result of the examination was the discovery that the contents of the barrels were not Portland cement.

The material which had been packed in the barrels was a hardened substance like clay or mortar, coarse in its grain and different from any cement and practically worthless, while Portland cement was worth from $2.25 to $2.50 per barrel.

The jury found a verdict for the plaintiffs for the full amount claimed.

PECKHAM, J. The question in this case is as to the meaning of the receipt issued by the defendant. Does it mean that the warehouseman acknowedges and asserts the fact that the merchandise delivered to him and consisting of twenty-five hundred barrels does in truth contain the genuine article, Portland cement, or does it mean that the warehouseman has received that number of barrels bearing the usual appearance of barrels in which Portland cement is packed and with the usual marks and signs thereon, and represented to him to be Portland cement, and which he in good faith supposes to be that article?

The defendant, at the time he received this merchandise, was a warehouseman, and in connection with his business he had a bonded warehouse under license from the United States government, and in it he received on storage imported, dutiable merchandise which could not be delivered until the duty was paid. The goods in question came to the defendant from the vessels named in the two receipts, which vessels came from Marseilles, France, from which place Portland cement is imported. The barrels came on trucks licensed to transport bonded merchandise, and when they came in the duty had not been paid. They were stored in the bonded warehouse under the joint custody of the defendant and a government officer. The duty was subsequently paid. The defendant testified that the warehouseman had not authority to open goods stored in a bonded warehouse without permission of the government.

These barrels the defendant testified were in character, appearance and style, the same as those in which Portland cement was imported. The brand on the barrel heads was "Wil, Neight & Co., Portland Cement, Trade Mark." There was also a label on each barrel to the same effect, and also some other signs and letters, all of them consistent with the idea that the barrels contained genuine Portland cement, and in brief the whole external appearance of the barrel was that of one in which Port-

We think the language of the receipts is merely descriptive of the barrels which defendant received.

It is meant to describe their outside appearance and that they were in truth marked and represented to be Portland cement. It land cement was usually imported. Upon these facts, the court charged as above stated.

cannot be that the language properly construed could mean that the warehouseman warranted such contents. If that were the meaning to be attributed to such a statement, the warehouseman could be safe only after he had examined critically and cautiously the contents of each box or barrel which he received. To do so would consume a great deal of time, and frequently necessitate the employment of experts who dealt in or were judges of the particular article claimed to be delivered, and they would have to make such an examination of the article as its nature demanded before an opinion could be arrived at.

Anyone at all familiar with the business of a warehouseman knows that he could not transact business if he were first to examine the contents of each package, barrel or box of merchandise which was delivered to him and so packed as to cover and conceal the real nature of the goods delivered. The warehouseman cannot be supposed to know the contents of barrels or boxes so delivered to him. All he can be fairly charged with asserting by the mere acknowledgment of the receipt of merchandise thus described is that the box or barrel in which it is packed bears the same outward appearance as does the box or barrel in which merchandise of the character described is usually carried, and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels or character of the barrel or box from that in which goods of the character described are usually transported, and that the articles have been represented to him and that he believes them to be as described.

It has been urged that a warehouseman may easily protect himself from any liability by signing a receipt which in so many words acknowledges the receipt of barrels or boxes said to contain certain described merchandise but the contents of which are unknown by the warehouseman, and which, therefore, he does not warrant. This is true, but it does not answer the objection to a warranty which arises out of the transaction itself. In its very nature it seems to me plain that no warranty as to contents can reasonably

be implied under these circumstances from the use of such language as these receipts contain. Representations in a bill of lading or warehouse receipt which should be held to be warranties should be confined usually to those which the carrier or warehouseman may ordinarily be assumed to have knowledge of, or which he or his agents ought to know. As was said by Mr. Justice Hoar in Sears v. Wingate (3 Allen, 103, at 107), when speaking of a bill of lading, the master is estopped to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are or ought to be within his knowledge.

It is known and understood that the business of a warehouseman is not that of an inspector of property delivered to him, nor is he an insurer of the contents of packages. It is no part of the duty of the defendants as a warehouseman to have property inspected or its quality warranted, and no proceedings are supposed to take place to enable a warehouseman to become acquainted with the contents of packages for the very reason that in his business it is unimportant what such contents are. The general object of giving a description of the property in the receipt, is for purposes of identification only, so that the identical property delivered to the warehouseman may be delivered back by him upon the return of the warehouse receipt, and for such purpose it is sufficient to describe the property as it by its external appearance seems to be. Such a description is not calculated to mislead any one in regard to the actual contents of the package. When the warehouseman described in this case the outward appearance and marks and the numbers on the barrels, he did warrant the correctness of his description so far as to say that the numbers stated were in reality delivered and that they were marked as stated, and also that there was nothing unusual in the appearance of the barrels or in the direction, marks or labels upon the merchandise which would reasonably lead to any suspicion that the contents were not what they were represented to be.

A warehouse receipt does not differ in this respect from a bill of lading. In the one case the warehouseman agrees to keep, and in the other case the carrier agrees to transport the goods which he receives, but the acknowledgment of delivery either to the warehouseman or to the carrier is essentially the same and the

same rules govern in the interpretation of the receipt. In Hastings v. Pepper (11 Pick. 41), Shaw, Ch. J., said that the acknowledging to have received the goods in question in good order and well conditioned would be prima facie evidence that as to all circumstances which were open to inspection and visible, the goods were in good order, but the carrier could show that a loss did in fact proceed from a cause existing at the time of the execution of the bill of lading if it were not then open and apparent, and if he showed that fact it would be a defense. This statement is approved in Nelson v. Woodruff (1 Black. [U. S.] 156 at 160).

In Warden v. Greer (6 Watts, 424), Huston, J., in delivering the opinion of the Pennsylvania Supreme Court, held that generally a bill of lading could not be contradicted, but that if a captain were innocently to receive a barrel of corn instead of a barrel of coffee, or a barrel of cider instead of Madeira wine, or a package of cotton linen instead of flaxen linen; it would seem that his bill of lading would not and ought not to exclude him from proving this, as the captain does not open or otherwise examine the casks.

We think the rule is clearly expressed in Hale v. Milwaukee Dock Co. (23 Wis. 276; S. C., on second appeal, 29 Wis. 482). It is there stated (29 Wis. at 489) that the warehouseman or carrier in regard to packages which are so covered as to conceal their contents, receipts them upon the representation of the bailor and upon the external appearance corresponding therewith as to contents. He is not supposed to have any actual knowledge of their contents and the language of the receipt is not to be so understood. It is a warranty that the barrels are so represented and so appear to him to the extent of his knowledge or means of information on the subject, and as they are represented and appear to him, so he represents or describes them in his receipt.

In the Wisconsin case here alluded to, the warehouseman receipted for fifty-four barrels of mess pork. The Supreme Court held the defendant at liberty to show its readiness to re-deliver the identical property delivered to it and that the barrels when the defendant took them and unknown to it really contained nothing but salt. A verdict for the plaintiff (who was a bona fide holder for value) was, therefore, set aside and a new trial granted.

It was stated upon the argument here that a different doctrine prevails in this state and counsel cited as authority for such claim Jones on Pledges, §252. The learned author does so re-

mark and the cases of Meyer v. Peck (28 N. Y. 590); Armour v. Railroad Co. (65 id. 111), and Miller v. Hannibal & St. Jo. R. R. (24 Hun. 607), are cited as authority for such alleged difference. * * *

From this review of the authorities upon which it was claimed that the courts of New York had taken an exceptional stand, I think it quite plain that in truth no exceptional doctrine obtains here. I think that we in common with the courts of other states hold the carrier or warehouseman estopped in regard to any error or misstatement in the bill or receipt only when it amounts to a representation as to a fact which was, or in the ordinary course of business ought to have been, within his knowledge and which, therefore, such a third person acting reasonably would have a right to rely and act upon.

The court below, however, has sustained the right of the plaintiffs to recover in this case chiefly upon the provisions of the Factor's Act of 1858, as amended by that of 1866 (Chap. 326 of the Laws of 1858; chap. 440, Laws 1866). The first section of the amended act prohibits a warehouseman (among others) from issuing a receipt for any goods unless such goods shall have been actually received into the store or upon the premises of such warehouseman at the time of issuing the receipt.

The court held that if the goods were not Portland cement then the receipts issued by the defendant were untruthful and a violation of the above cited first section of the act.

We think the act was not intended to and does not reach this case. It was not passed in order to transform a warehouseman from a mere depositary to that of an insurer of the kind and quality of goods deposited with them. It was not intended to alter the law in regard to the character of such a representation as is contained in these receipts or to make it anything other than a description of property as above stated. We are quite clear the act does not cover such a case as this if we assume the defendant was honestly mistaken when he described the goods actually received by him as Portland cement. The court withdrew from the jury the question of the knowledge of the defendant as to the character of the merchandise received by him as entirely immaterial, and hence we must assume his ignorance in discussing his liability. The English statute to amend the law relating to bills of lading, passed in 1858 (18 & 19 Vic. chap. 111), recited that

"it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid." It was then enacted that bills of lading in the hands of a consignee or indorsee for value, representing goods to have been shipped on board a vessel, should be conclusive evidence of such shipment as against the master, notwithstanding the goods of some part had not been so shipped, unless the indorsee had notice, etc.

This statute evidently referred to a case where there had been no delivery of any goods or only a part delivery of the amount receipted for, and we think the section of the acts of the legislature of this state above cited, refers to the same kind of omission. Signing a receipt for goods actually delivered, but known by the signer to be something other than that described in the receipt, would be a fraud and amount to a false representation for which the signer would be liable in any event.

But this issue was not submitted to the jury.

It is urged that such a receipt is made negotiable. We do not see that its negotiability is of the least importance in the decision of this question. That there is a certain kind of negotiability attached to this kind of a receipt and to a bill of lading is not disputed. (Dows v. Perrin, 16 N. Y. 325; Dows v. Greene, 24 id. 638; Lickbarrow v. Mason, 1 Smith's L. C. [8th Am. ed.] 1159 and notes; § 6, Factors' Acts, above cited.)

It is not the same thing as the negotiability of a promissory note or bill of exchange. It could not be in the nature of things, but by the endorsement and delivery of such a receipt or bill of lading, the indorsee for value and without notice is entitled to hold the property represented thereby under the circumstances stated in the above mentioned acts.

In this case the plaintiffs are entitled to be treated as the owners of the property which was deposited with defendant, and they are entitled to its re-delivery to them upon payment of the charges, just the same as the original owner would have been but for the transfer. When, however, the plaintiffs demand, not the identical property which was deposited with the defendant, but such property as would have been deposited had the description

in the receipt been correct, the right to demand such a delivery must be based not upon the mere transfer of the receipt, but upon the principle of estoppel; such a principle as precludes a party who has made a representation upon which another has acted from denying the truth of that representation. Obviously the first inquiry must be whether such a representation has been made, and when it turns out that it has not, the estoppel falls to the ground.

Our conclusion is that the trial judge erred in his charge to the jury above quoted, and in his refusals to charge as above requested, and for such errors the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.[1]

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3. RIGHTS OF BAILEE.

ANONYMOUS, Y. B. 11 Hen. IV. 17, pl. 39.

(1409)

A man sued a general replevin for his cattle wrongfully taken. Trem.' said the cattle were another's, and not the plaintiff's, and he made an avowry for a return.

Skrene. He whom you allege to have the property in the cattle lent to us to manure and improve our land by force whereof they were in our custody, and we demand judgment, and we pray damages.

Trem.' And we demand judgment, because you knew the

[1] "At the end of the period for which the goods are hired he must return them to the lessor in proper condition, and he cannot justify his refusal to give them up by setting up a jus tertii (Barker v. Furlong, 1891, 2 Ch. 172), at any rate unless he refuses delivery under the authority of and defends the action for the third person (Rogers v. Lambert, 1890, 24 Q. B. D. 573, following Biddle v. Bond, 1866, 6 B. & S. 225). To this there is an exception, for the hirer is not responsible for failure to redeliver where he is unable to make it through no fault of his own, e.g. if the goods are seized and are in the custody of the law (Verrall v. Robinson, 1835, 2 C. M. & R. 495), or if the goods are destroyed under circumstances which throw no liability either in contract or in tort on the hirer (Taylor v. Caldwell, 1863, 32 L. J. Q. B. 164). And he is not responsible if he has been evicted by title paramount, unless, indeed, he took the goods with notice that he was liable to such eviction (Ex parte Davis, 1882, 19 Ch. D. 86)." 6 Ency. of Laws of Eng., 207-8.

property was in another, as we have alleged, and we pray for a return.

COLEPEPER (J.).—He supports his action well enough on the special matter which he has shown, why do you demur?

Trem.' 'He ought to have alleged in his writ de averiis in custodia sua existentibus.

Skrene. It is at our election to do either the one or the other.

THIRNING (C. J.).—Plead no more about this matter, for against you he has property, &c.

WARD v. MACAULEY, 4 T. R. 489.

(1791)

The plaintiff, landlord of a house, let the same to one Lord Montfort ready furnished, under a lease containing a schedule of the furniture. The defendants (sheriff) seized a part of this furniture, under an execution against Lord Montfort, notwithstanding the officer had notice that it was the property of the plaintiff. Plaintiff brought an action of trespass.

At the trial Lord Kenyon thought that trespass would not lie, but that plaintiff should have brought trover. A verdict, however, was taken for the plaintiff, with liberty to the defendants to move to enter a nonsuit.

LORD KENYON, Ch. J. The distinction between the actions of trespass and trover is well settled; the former is founded on possession, the latter on property. Here the plaintiff had no possession; his remedy was by an action of trover founded on his property in the goods taken. In the case put of a carrier, there is a mixed possession: actual possession in the carrier, and an implied possession in the owner.

BULLER, J. The carrier is considered in the law as the servant of the owner, and the possession of the servant is the possession of the master.

PER CURIAM. Rule absolute.

LITTLE v. FOSSETT, 34 Me. 545.

(1852)

Trespass for damages to a hired wagon and harness, injured by negligence of defendant in driving against the wagon on the highway. Verdict for plaintiff.

By COURT, APPLETON, J. The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession. The longer or shorter period of such bailment, the greater or lesser amount of compensation—and whether such amount is a matter of special contract or is a legal implication from the beneficial enjoyment of the loan does not seem to affect the question. "The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer:" 2 Kent's Com. 574. By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right: Story on Bail., sec. 394. In Croft v. Alison, 4 Barn. & Ald. 590, the court held that the plaintiffs, who had hired the chariot injured, for the day, and had appointed the coachman and furnished the horses, might be deemed the owners and proprietors of the chariot, and as such might recover of the defendant for the injury it had sustained from his negligent driving. In Nicolls v. Bastard, 2 Cromp. M. & R. 659, it was decided that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover either by the bailor or bailee, if taken out of the bailee's possession.

The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. "If," say the court, in White v. Webb, 15 Conn. 302, "the suit is brought by a bailee or special propertyman against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner." This view of the law seems fully confirmed by the uniform current of authority: Lyle v. Barker, 5 Binn. 457; Ingersoll v. Van Bokkelin, 7 Cow. 670; Chesley v. St. Clair, 1 N. H. 189; 2 Kent's Com. 585.

The instructions given were correct. The exceptions are overruled, and judgment is to be rendered on the verdict.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY v. THE NEW JERSEY ELECTRIC RAILWAY CO., 60 N. J. L. 338; 38 Atl. 828.

(1897)

On rule to show cause.

The opinion of the court was delivered by

LIPPINCOTT, J. In this case the action is brought by the New York, Lake Erie and Western Railroad Company by its receiver against the defendant to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company, at a crossing over a public highway, at Singac, in Passaic county, on September 2d, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day, for use, to the New York and Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman and employes, running the same over and upon its own roadbed and rails at such highway crossing at the time and place of collision.

The defendant was a street electric railway company, running along and upon the Little Falls road, which is a public highway, from Paterson to Passaic and Rutherford. The tracks of the New York and Greenwood Lake railway cross this highway at Singac. At the same point the electric car tracks of the defendant company cross the tracks of the defendant railroad company, and the collision between the electric car and the locomotive, whilst both were in the act of making this crossing, caused the damage to the locomotive and cars of the plaintiff.

The cause was tried at the Passaic Circuit, together with the case of the New York and Greenwood Lake Railway Company against the defendant, for damage to the tracks of the railroad, and to other cars owned by it, before the same jury, and the evidence is the same as to both cases except as to damages. Both

cases were argued in this court at the November Term, 1896, the former case upon a rule to show cause why the verdict, which was for the defendant in that case, should not be set aside, which rule was discharged at the February Term, 1897, upon an opinion of the court rendered at that term. Ante p. 52. In that case this court, in its opinion, held that there existed no error of the trial court in the admission or rejection of evidence or in its instruction to the jury, nor was the verdict against the evidence or the weight thereof, nor contrary to the charge of the court.

In the cause now in hand the trial justice directed the jury to return a special verdict. The jury were directed to find by their verdict, first, whether the collision or accident occurred by reason of the negligence of the employes of the defendant in charge of and operating the electric car of the defendant company; secondly, whether the negligence of the employes of the New York and Greenwood Lake Railway Company, the bailee of the plaintiff company, of the locomotive and some of the cars of the train, contributed to the collision or accident; and thirdly, what amount of damages had the plaintiff suffered.

The jury by their special verdict found negligence of the employes of the defendant company causing the accident; also that the negligence of the employes of the New York and Greenwood Lake Railway Company contributed thereto; and also that the plaintiff company had suffered damage to the amount of $1,475.

On this verdict the postea was framed, and the motion now is for judgment thereon.

The right of the plaintiff to recover against the defendant is denied on the ground, first, that under the verdict finding that the contributory negligence of the New York and Greenwood Lake Railway Company having concurred and co-operated with the negligence of the defendant in causing the injury, that therefore the action should be alone against that company, and that for such injury action only can be had against the New York and Greenwood Lake Railway Company, which was the bailee of the plaintiff of the locomotive and cars, and that it cannot be maintained against the defendant, although its negligence contributed to the injury.

This contention involves the question of the right of the bailor

against a third party as wrongdoer in relation to the subject-matter of a bailment for hire for use.

There is no question but that for the injury to the actual possession of the bailee, action against a third party will lie only at the suit of the bailee, and the general current of authority appears to be that the bailee can include in such suit damages for the entire injury to the subject of the bailment, but no case is found which denies the right of the bailor to sue and recover for the permanent injury to the property even before the expiration of the bailment.

One who has a fixed reversionary interest in property has a right to sue one who is not in possession thereof for an injury to such property which will depreciate its value when it comes to his hands, and is entitled to recover damages to the extent, of such depreciation. The owner of a reversionary interest in personal property has the same right of action for an injury thereto as in the case of real property. Sherm. & R. Negl., § 119.

The bailor, when he makes a bailment for hire, parts with the right of possession to the chattel, and it has been held that he cannot, during the existence of the bailment, maintain an action of trespass for its asportation or trover for its mere conversion, or replevin to recover back its possession, against any third person, but it seems to be the accepted doctrine, at present, that if any permanent injury be done to the chattel, he may maintain a special action on the case against a third party for injury done by such third party to the reversionary interest, and this seems to be, both by reason and authority, the rule, whether an action might or might not be maintained by the bailee against such party for trover, trespass or replevin, to control the immediate possession. Pol. Torts. 432.

A person who has let a chattel out to hire may nevertheless sue a third party for damages in respect to the permanent injury to the reversionary interest. Add. Torts. 410.

In Mears v. London, &c., Railway Co., 11 C. B. (N. S.) 850; S. C., 103 Eng. Com. L. 849, the case was that a barge was let to hire. The defendant, who was not the bailee, was engaged in raising a boiler out of the barge when the boiler negligently fell, destroying the barge. The court held that the plaintiff, who was the owner of the barge, had the right to sue a third

party whose negligence caused the injury, and laid down the rule that although the owner could not bring an action when there had been no permanent injury to the chattel, where there is such permanent injury the owner might maintain an action against the person whose wrongful act had caused the injury.

The general rule appears to be that the owner of a chattel, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury thereto. This seems to be the rule whether the bailment has expired or not. Howard v. Farr, 18 N. H. 457; White v. Griffin, 4 Jones (N. C.) 139; Railroad Company v. Kidd, 7 Dana (Ky.) 245; Hawkins v. Phythian, 8 B. Mon. (Ky.) 515.

A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found. Story Bailm. (9th ed.), § 413.

In Enos v. Cole, 53 Wis. 235, the right of the action of trespass against a third party, to whom the bailee had improperly sold the goods bailed, was distinctly recognized.

Whether the bailment in the case in hand had expired or not, it seems, can make very little difference. This bailment, or hire of this locomotive and car, was presumably by the bailor at its will.

A bailment may be determined by the mere efflux of time, as where the chattel is bailed for a stated period. Here the bailment was not for any stated period. It may be determined by the accomplishment of the object for which the thing was bailed, as where the chattel is hired for a particular purpose, or is pledged until the loan is repaid. It may be dissolved by mutual agreement at any time. And either party, as has been said, where the bailment is not for any particular time, may terminate it at will. It may be terminated by the total or partial destruction of the subject-matter of the bailment, as where a chattel is lost or is destroyed. It may be also terminated where the bailee disposes of it contrary to the terms of the bailment. In this case the bailment was terminated at the time of the injury,

for then it was no longer, under the evidence, fit and suitable for the use which the contract of bailment contemplated. Whilst a mere misuse might not terminate the bailment, yet when, by the negligence of the bailee, either alone or in conjunction with the negligence of a third party, it is no longer fit and suitable for the uses for which it was hired, both by reason and all the authorities, the contract of bailment is at an end.

It would seem to be clear that, under general principles, a bailor can maintain an action for injury to the property bailed, at the hands of a third party, who is a wrongdoer in relation thereto, especially wherever the injury is of permanent character. Therefore, the contention of the defendant that the right of action was alone against the bailee must fail.

But the right to recover is secondly denied upon the ground that the contributory negligence of the New York and Greenwood Lake Railway Company, the bailee of the locomotive and cars, is a bar to recovery by the plaintiff company, which was the bailor of the same, and that the contributory negligence of the bailee is imputable to the plaintiff as bailor, and therefore, prevents a recovery. It is contended that in law the bailee could have included the injuries to the locomotive and cars in his action against the defendant, and that its contributory negligence would have been a complete defense to the action, and this being so that this same contributory negligence can be successfully set up against the plaintiff, who is the owner of the property, or in other words that the possession by the bailee involves the bailor in all the consequences of the default of the bailee, however much the act of wrong-doing by the third party might be the joint cause of injury to the chattels in the possession of the bailee.

The reason of this contention, as it appears to the court, is not apparent or well founded.

It need only be said that a bailment is a contract which is interpreted by the same rules as other contracts. The bailor and bailee are just as independent of each other in regard to the subject-matter as the contract by its terms permits them to be. It is the delivery of the thing in trust for some special object or purpose upon a contract express or implied to conform to the object or purpose of the trust. Story Bailm. (8th ed.) 4. This

is evidently true as to a bailment for hire to use—locatio rei. If not a part of the express contract the law impliedly engages to allow the full use and enjoyment of the chattel by the bailee, to the extent of the use and enjoyment of the object of the hiring and for the time hired. This right of the bailee is quite independent of any control by the bailor, but there is also the right of the bailor to have the thing used with care and moderation; to have it applied to the use for which it is hired and no other; to have it used with reasonable care for its preservation, and to have redelivery when the use to which it is to be devoted is completed or performed, or the bailment has otherwise expired. The bailee is responsible to the bailor for injuries to the subject of the bailment by reason of the negligence of the bailee, and of his servants in the course of his employment, occasioning injury to the property. The general property remains in the bailor, and the bailee only has a special interest for the express or implied objects of the bailment.

Under these general principles now well established as governing the contract of bailment, it would be entirely too artificial to say that no right of action existed by the bailor against a third party as a wrongdoer for injury by negligence or otherwise to the chattel which was the subject of the bailment. It is not an answer that the bailee has his right of action for the full injury against the wrongdoer, for the bailee may never choose to seek such a remedy, nor can he be compelled to do so, nor can it be said with any greater reason that the bailor must resort alone to the bailee for redress for the injury, for it may have occurred in spite of the exercise of the full degree of care required of the bailor, as in case of theft by the servants of the hirer, for which he is not, generally speaking, liable unless there are some circumstances which impute to him a want of due diligence. Vere v. Smith, 1 Vent. 121; S. C., 2 Lev. 5; Story Bailm. (8th ed.), §§ 38, 407. The servants of the bailee are responsible to the bailor for their malfeasances, not because they are the servants of the bailee, but because they are active wrongdoers to the bailment. Lane v. Cotton, 12 Mod. 488; Story Bailm. (8th ed.), § 405; Story Ag., §§ 309-320. The care or diligence required to be exercised depends upon the nature of the subject and it rises in proportion to the demand for it, and when the re-

quired care is exercised the bailee is no longer responsible to the bailor.

Therefore, there is nothing in the relation of the bailor and bailee which of itself can prevent the bailor from seeking out the third party as the wrongdoer, and imposing upon him the liability for the results of his conduct to the subject of the bailment. It would seem, upon reason, that there could exist no objection to the joint liability of the wrongdoer and the bailee, when the joint negligent act of both caused the injury.

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor and prevents a recovery on the part of the bailor against the defendant as a third party, who is a joint wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and, therefore, the case must be considered with the fact of the contributing negligence of the bailee established.

In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor nor represent him in such relation as to render the bailor liable for such injuries, nor are the servants of the bailee the servants of the bailor or in any sense acting for him, and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other.

In this case it cannot be contended that the plaintiff company would have been responsible to the defendant if the negligent use of the locomotive by the servants of the New York and Greenwood Lake Railway had occasioned an injury to the defendant's car at this crossing. This negligence, however much the occasion of the injury to the defendant, could not have rendered the plaintiff company responsible so long as, in this case, no act or conduct of the plaintiff company was in question. It did not, in fact, advise, encourage or permit in the hands of its bailee the negligent use of this locomotive.

The contributory negligence of a third person can only be set up in a defense when it is legally imputable to the plaintiff, and its existence must depend upon some connection or relation between the plaintiff and the third person from which such legal responsibility may arise. It is a general rule that it is no justification of the misconduct of the defendant that some third person, a stranger, was also in the wrong. The negligence of the servant in the course of his master's employment is imputable to the master, and so as between agent and principal. But the negligence of one passenger in a car standing alone, inflicting injury upon another passenger, is not imputable by the railroad company, a common carrier of passengers. There must exist concurring negligence, in some respect, in the railroad company. Sheridan v. Brooklyn, &c., 36 N. Y. 39; Cannon v. Midland and Great Western Railway Co., L. R., 6 Ir. App. 199. If the defendant be negligent, the fact that the negligence of others co-operated or concurred with it in effecting the wrong does not affect the question or measure of liability. Mott v. Hudson River Railroad Co., 8 Bosw. 345; Atkinson v. Goodrich Transportation Co., 60 Wis. 141.

It may be deemed to be settled in this state that the employes or servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed. As where A hired a coach and horses with a driver from B, to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train and A was injured. In an action by A against the railroad company for damages it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger, against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct.

The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring. New York, Lake Erie and Western Railroad Co., v. Steinbrenner, 18 Vroom 161; Bennett v. New Jersey Railroad Co., 7 Id. 225.

There is no perceivable distinction between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one cannot be imputable to the other.

It is only when the contributory negligence is of such a character and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages for the consequences of such negligence, then when the plaintiff brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him.

This relation does not exist between the bailor and bailee under the ordinary contract of bailment.

The case of Hawkins v. Phythian, 8 B. Mon. (Ky.) 515, is a case very similar in the application of the principles of law to the one in hand; in this case the plaintiff hired a slave to A, who allowed him to go with B; while B had the slave, he put him on a restive horse which threw the slave and killed him. The plaintiff sued A and B together. The verdict was allowed to stand against B, although it was set aside as to A, by reason of an erroneous instruction of the court to the jury.

The cases cited by the defendant in his argument are mainly based on the doctrine laid down in Thorogood v. Bryan, 8 C. B. 114, in which the deceased intestate, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus and received injuries from which death ensued. The court held, in that case, that if the want of care on the part of the driver of the omnibus in which the deceased was riding in not driving up to the curb to put the deceased down, had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence.

It is sufficient to say that this doctrine has been thoroughly disapproved in this state in the case of New York, Lake Erie and Western Railroad Co. v. Steinbrenner, 18 Vroom 161. Be-

fore the Steinbrenner case had been decided, Chief Justice Beasley, in the case of Bennett v. New Jersey Railroad Co., 7 Vroom 225, had repudiated the doctrine. It has now been overruled in England in the Bernina case, L. R., 12 Pro. Div. 58. The Supreme Court of the United States, in the case of Little v. Hackett, 116 U. S. 366, also repudiates it.

There is a line of cases in which the peculiar contractual relations between a shipper of goods and the common carrier thereof locatio operis mercium vehendarum, who is liable to the shipper against all events except the acts of God or the public enemy, or the natural wear and tear of the article shipped, and responsible for all the consequences of his conduct as an insurer against loss except from such excepted causes, which hold the carrier alone responsible for injury. The shipper, according to such authorities, cannot recover against a third party for negligence in the care of such goods or injuries to them.

The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is, by all legal writers, classed as a different contract of bailment having peculiarities, and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire.

The cases cited by the defendant are Vander Plank v. Miller, 1 Moo. & M. 169; Simpson v. Hand, 6 Whart. 311; Transfer Company v. Kelly, 36 Ohio St. 86; Arctic Fire Insurance Co. v. Austin, 69 N. Y. 470. These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common carrier.

He is treated as an insurer against all but the excepted perils (Jones Bailm. 101), and the shipper cannot look beyond him for liability, and this rule is said to be grounded upon public policy.

I cannot perceive that whether, in respect to this action, the duty of the defendant, and the bailee were joint or separate can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tort-feasors. If the duty to plaintiff was a separate one which was neglected to be performed

by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint and the tort-feasors are subject to a like liability. Matthews v. Delaware, Lackawanna and Western Railroad Co., 27 Vroom 34.

The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner.

It would seem that the intervention of the negligence of the bailee could not shield the defendant from the injury caused by its own negligence. Both might have been selected as joint tort-feasors, or the action could be maintained against either.

The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery.

Judgment must be entered on postea for the damages found by the jury.[1]

HOLMES, THE COMMON LAW, 171-5, 242-4.

The bailor also obtained a right of action against the wrong-doer at a pretty early date. It is laid down by counsel in 48 Edward III (Y. B. 48 Ed. II. 20, pl. 8; Bro. Trespass, pl. 67), in an action of trespass by an agister of cattle (as also in 22 Edward IV. that trespass will lie either by the owner or by the one in custody).

[1] Negligence of bailee imputed to bailor.—Illinois, etc. Co. v. Sims, 77 Miss. 325, contra. See 14 Harv. L. Rev. 150. Gibson v. B. & E. E. Ry., 75 Atl. R. 195, accord.

Actions by bailor against bailee, and against third persons, and actions by bailee against third persons.—Gray, Cases on Property, Vol. I., 237-264; Smith's Cases on Torts, 340; Gibson v. B. & L. E. Ex. Co., 75 Atl. L. 195.

Bailor's liability to third parties.—See Keaven v. Pender, L. R. 11 Q. B. D. 503.

It was expected that some action should be given to the bailor as soon as the law had got machinery which could be worked without help from the fresh pursuit and armed hands of the possessor and his friends. To allow the bailor to sue and to give him trespass, were pretty nearly the same thing before the action on the case was heard of. (Trespass had not always the clear outline which it developed later, and even when trespass was allowed the bailor it did not go beyond the case of wrongful taking out of the custody of the bailee.) Even thus limited, the right to maintain trespass is now denied where the bailee has the exclusive right to the goods by lease or lien; although the doctrine has been repeated with reference to bailments terminable at the pleasure of the bailor.

It is true that in Lotan v. Cross (2 Camp. 464), Lord Ellenborough ruled at nisi prius that a lender could maintain trespass for damage done to a chattel in the hands of a borrower, and that the case is often cited as authority without remark. Indeed, it is sometimes laid down generally, in reputable textbooks, that a gratuitous bailment does not change the possession, but leaves it in the bailor; that a gratuitous bailee is quasi a servant of the bailor, and the possession of one is the possession of the other; and that it is for this reason that, although the bailee may sue on his possession, the bailor has the same actions. * * * But on whatever ground Lotan v. Cross may stand, if on any, it cannot for a moment be admitted that borrowers in general have not trespass and trover. A gratuitous deposit for the sole benefit of the depositor is a much stronger case for the denial of these remedies to the depository; yet we have a decision by the full court in which Lord Ellenborough also took part, that a depositary has case, the reasoning implying a fortiori a borrower would have trespass. And this has always been the law. * * *

The meaning of the rule that all bailees have the possessory remedies is, that in the theory of the common law every bailee has a true possession, and that a bailee recovers on the strength of his possession, just as a finder does, and as even a wrongful possessor may have full damages or a return of the specific thing from a stranger to the title. On the other hand, so far as the possessory actions are still allowed to bailors, it is not on the

ground that they also have possession, but is probably by a survival, * * * which in the modern form of the law is an anomaly. * * *

It has been supposed, to be sure, that a 'special property' was necessary in order to maintain replevin or trover. But modern cases establish that possession is sufficient, and an examination of the source of our law proves that special property did not mean anything more. (In the writs the bailee sued for a taking of bona et catalla sua.) * * *

The substance of the matter was, that goods in a man's possession were his (*sua*), within the meaning of the writ. But it was very natural to attempt a formal reconciliation between that formal word and the fact by saying that, although the plaintiff had not the general property in the chattels, yet he had a property as against strangers, or a special property. * * *

I have explained the inversion by which a bailee's right of action against third persons was supposed to stand on his responsibility over, although in truth it was the foundation of that responsibility, and arose simply from his possession. The step was short, from saying that bailees could sue because they were answerable over, to saying that they had the property as against strangers, or a special property, because they were answerable over, and next that they could sue because they had a special property and were answerable over. And thus the notion that special property meant something more than possession, and was a requisite to maintaining an action, got into the law.

CHAPMAN v. ALLEN, Cro. Car. 271.

(1632)

Action of trover of five kine. Upon not guilty pleaded, a special verdict was found, that one Belgrave was possessed of those five kine, and put them to pasturage with the defendant, and agreed to pay to him twelve pence for every cow weekly as long as they remained with him at pasture; and that afterwards Belgrave sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time that they had been with him, which amounted to ten pounds: afterwards one

Foster paying him the said ten pounds by the appointment of Belgrave, he delivered the five beasts to Foster; and if super totam materiam he be guilty, they find for the plaintiff, and damages twenty-five pounds; and if, &c. then for the defendant.

JONES, Justice, and myself (absentibus coeteris justiciariorum), conceived, that this denial upon demand, and delivery of them to Foster, was a conversion, and that he may not detain the cattle against him who bought them until the ten pounds be paid, but is inforced to have his action against him who put them to pasturage. And it is not like to the cases of an innkeeper or tailor; they may retain the horse or garment delivered them until they be satisfied, 1 Con. Dig. 211, but not when one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them. Whereupon rule was given, that judgment should be entered for the plaintiff.[1]

NAYLOR v. MANGLES, 1 Esp. 109.

(1794)

Assumpsit for money had and received. The plaintiff has purchased from one Boyne twenty-five hogsheads of sugar then lying in the defendant's warehouses, who was a wharfinger. Boyne was in debt to the defendant to the amount of £167, part of which only was for the charges of these twenty-five hogsheads of sugar, the remainder was for the balance of a general

[1] "The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books. 2 Roll. Ab. 85, pl. (1604); Mackerney v. Erwin (1628), Hutt. 101; Chapman v. Allen (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, S. C. But in Chapman v. Allen, the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in Jackson v. Cummins, 5 M. & W. 342, this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and 'bailees who spend their labor and skill in the improvement of the chattels' delivered to them. The agistor has a lien by the Scotch law. Schouler, Bailments (2d. ed.), § 122." Ames, 2 Harv. L. Rev. 62.

A lien has generally been given by statute to agistors and stablekeepers.

account, for which the defendant claimed a lien, and refused to deliver them to the plaintiffs until the whole sum was paid. The plaintiffs paid him the whole money, and then brought this action to recover it back.

The whole question turned upon the point whether a wharfinger had a lien for the balance of a general account upon the goods in his possession. The counsel for the defendant said that it had been decided in three different cases that they had, and called witnesses to prove it, with which the jury seemed completely satisfied.

LORD KENYON said liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by the law to receive goods, etc., in which case, as the law imposed the burden, it also gave him the power of retaining, for his indemnity. This was the case of innkeepers, who had by law such a lien. That a lien from usage was a matter of evidence. The usage in the present case had been proven so often, he said it should be considered as a settled point that wharfingers had the lien contended for.

GREGORY v. STRYKER, 2 Denio (N. Y.), 628.

(1846)

Error from the Schoharie common pleas, to review a judgment of that court in a cause commenced by Stryker against Gregory in a justice's court and determined in the common pleas on appeal. The action was trespass for a wagon, and the defendant, who was a constable, justified the seizure of it under an execution against one Rose; and the question was whether the wagon when taken by the defendant belonged to the plaintiff or Rose. Rose carried on the business of blacksmithing and was indebted to the plaintiff in a considerable sum. The plaintiff was the owner of an old wagon which Rose agreed to repair for him on account of the debt. The iron work was done at the shop of Rose, who procured the wood work and painting to be done by another person on his account, and charged the whole to the plaintiff. The old wagon, except the iron, was worth but little; none of the wooden part was used in the reparation except the tongue and evener. When finished the wagon was worth $90, and Rose's

account for repairs amounted to $78.50. The defendant took the wagon in the possession of Rose immediately after it was completed and sold it on the execution. The court below charged the jury that where an article is left to be repaired, it remains the property of the former owner when completed, although the repairs exceed the value of the article as it existed before they were put upon it, and that if it be taken by another the owner is entitled to recover its value including the new materials used in the repairs; and that this was the rule of law, although the discrepancy between the worth of the article when sent to the mechanic and its value when repaired, was as great as the proof showed it to have been in this case. The plaintiff had a verdict upon which the court gave judgment, and the defendant brought error here.

By the Court, BEARDSLEY, J. The principal controversy in this cause is whether the wagon in question when taken by the defendant belonged to the plaintiff or to Rose. The other points were disposed of by the jury under proper instruction from the court.

As the value of the new materials and labor used and employed in repairing or re-constructing the wagon, greatly exceeded that of the old materials used in the operation, it was urged that this was really a contract with Rose to make a new wagon, and not for the repair of an old one, and therefore, as most of the materials were furnished by him, his right of property in the vehicle would continue until its completion and delivery under the contract.

No doubt where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or out of materials the principal part of which are his own, the property of the article, until its completion and delivery, is in him and not in the person for whom it was intended to be made. (1 Cowen's Tr. 2d ed. 289; 2 Kent, 361; Merritt v. Johnson, 7 John. 473; 1 Chitt. Pl. 7 Am. ed. 381; Atkinson v. Bell, 8 Barn. & Cress. 277; 2 Chitt. Com. Law. 270.) But it is equally clear, as a general proposition, that where the owner of a damaged or worn out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the

original owner, for whom the repairs were made, and not in the person making them. The agreement in such case is but an every day contract of bailment—locatio operis faciendi: (Story on Bl. 3d ed. § 421, 422, a; 2 Kent, 588:) and the original owner so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessorial additions are made in bringing it to its new and improved condition.

Nor am I aware that in this class of cases it is at all important what the value of the repairs, actual or comparative, may be. No case is referred to which proceeds on that distinction, nor any writer by whom it is adverted to as material. If we adopt this distinction, what shall be its limit? The general property must be in one party to the exclusion of the other, for surely they are not tenants in common in the thing repaired. Shall we then say that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition, and vice versa, where they exceed it in value, title to the article, as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied without great difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. There are a multitude of instances in which the expense of proper repairs greatly exceeds the value of the article on which they are made. It is so in the lowly operations of footing an old pair of boots, and not unfrequently in repairing a broken down carriage. The principle contended by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied. (Story on Bl. § 440; Cross' Law of Lien, 331, chap. 21; Chitt. on Cont. 5th Am. ed. 544, 5; 1 Cowen's Tr. 295; Moore v. Hitchcock, 4 Wend. 292; Grinnell v. Cook, 3 Hill, 491.) This affords ample protection to the mechanic. And who, let me ask, ever heard that his lien was limited to repairs which in value, fall below that

of the original article on which they are made? Yet this limitation must necessarily exist, if the ground assumed by the counsel for the defendant is well taken.

Various cases have arisen in which property in a raw state was delivered by one person to another, upon an agreement that it should be wrought upon and improved by the labor and skill of the bailee, and when thus improved in value should be divided in certain proportions between the respective parties; and in which it was held that the original owner retained his exclusive title to the property until the contract had been completely executed; and this, notwithstanding the labor to be performed by the bailee might be equal or even greater in value than that of the property when received by him. Thus, in Pierce v. Schenck, (3 Hill, 28.) where logs were delivered at a saw mill, under a contract with the miller that he should saw them into boards and each party should have one half, it was held to be a bailment and not a sale of the logs, and that the bailor retained his general property until the contract was fully executed. The cases of Barker v. Roberts, (8 Greenl. 101,) and Rightmyer v. Raymond, (12 Wend. 51,) as well as many others, are to the same effect. To be sure these are not cases in which old articles were to be improved by repairs put upon them; yet the bailment in each is of the same nature and class, locatio operis faciendi; and as to this question the same principle should apply to both.

If I employ a mechanic to make a new article for me, the right of property while the work is going on, may essentially depend upon the original ownership of the materials used in its construction. If they are his, or chiefly his, we have seen that the property remains in him. If, on the other hand, the materials used were mine, the general property is in me, although he may add some small proportion of his own materials. (Story on Bl. § 423; 1 Cowen's Tr. 289.) The distinction between these cases is, that the first is a contract for the sale of the article in futuro, the latter a pure bailment.

It was not pretended that the real design of the plaintiff and Rose was to have a new wagon made in the name of repairing an old one, and that such a trick was resorted to as a mode of placing the property in the vehicle while being constructed, beyond the reach of the creditors of Rose. We must assume that

these parties acted with fairness and meant what they said; that the real object was as expressed, to repair an old wagon, and not to make a new one, although it must be admitted that the process of reparation has resulted in a substantial re-construction of the vehicle. Still the contract was for repairs, and not for a new wagon, which as between the parties to the contract should determine their rights. And as the contract was fair and free from fraud, the defendant, who stands in the place of the creditors of Rose, must abide by his rights. As between the plaintiff and Rose the property was in the former, and his right is the same against this defendant. No error of law therefore occurred on the trial of the cause.

Judgment affirmed.

WILSON v. MARTIN, 40 N. H. 88.

(1860)

Trespass, for taking and carrying away two harnesses. Plea, the general issue. It appeared that the plaintiff, George L. Wilson, was the owner of the harnesses, and that, for the purpose of getting them cleaned and oiled, he carried them to the shop of one Page, who was a saddler and harness-maker by trade, and employed himself, in connection with his business as a saddler and harness-maker, and as a part of the same, in repairing, cleaning, and oiling harnesses. Page performed labor in cleaning and oiling these harnesses, and for that service was entitled to receive of the plaintiff the sum of two dollars. While the harnesses were thus in the possession of Page, and after he had performed the service aforesaid upon them, they were attached by the defendant, Asa Martin, as deputy sheriff, upon a writ against one Morrison, as the property of Morrison; whereupon Page asserted his lien upon them for his labor done on the harnesses, as aforesaid, and refused to allow them to be taken from his possession by the defendant or anybody else until he was paid for such labor. The harnesses were moved from one room in Page's shop to another, and it was arranged between Page and the defendant that the harnesses should remain in Page's possession until his claim for labor was paid; the defendant agreeing that

if it became necessary, or if he should desire to take them away, that he would first pay to Page the amount of Page's claim. While the harnesses remained in this situation, and within some two days after their attachment by the defendant as aforesaid, this suit was brought against the defendant for said harnesses, but not until after the plaintiff had demanded them of the defendant and he had refused to give them up. Page's claim for services has never been paid, and the harnesses remain, and have ever remained in his possession; and his lien on the harnesses for such services has in no way been released or discharged.

The court ruled upon the foregoing facts the plaintiff could not maintain trespass, and a verdict was thereupon taken for the defendant, and judgment is to be rendered thereon, or the same set aside and a new trial granted, as shall be ordered at the law term.

FOWLER, J. The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation according to their means, to receive and be at trouble and expense about the personal property of others; and was limited to certain trades and occupations necessary for the accommodation of the public, such as common carriers, innkeepers, farriers, and the like. But in modern times the right has been extended so far that it may now be laid down as a general rule, to which there are few exceptions, that every bailee for hire, who by his labor and skill has imparted an additional value to the goods of another, has a lien upon the property for his reasonable charges in relation to it, and a right to retain it in his possession until those charges are paid. This includes all such mechanics, tradesmen and laborers, as receive property for the purpose of repairing, cleansing, or otherwise improving its condition. Cowper v. Andrews, Hobart 41; The Case of an Hostler, Yelverton, 67; and see the learned and valuable note of Mr. Justice Metcalf to this case, in his addition of Yelverton, 67, (a,) and the authorities therein collected and commented upon; Green v. Farmer, 4 Burr, 2214; Close v. Waterhouse, 6 East 523, n. 2; 2 Kent's Com. (5th ed.) 635; Grinnell v. Cook, 3 Hill 491, and authorities cited by defendant's counsel passim; Oaks v. Moore, 24 Me. (11 Shep.) 214.

In the case at bar, Page had a lien upon the harnesses in controversy, for the labor and expense he had bestowed in cleansing and oiling them, at his election, and had a right to retain the possession and control of them until his charge in that behalf should be paid. He claimed his lien and asserted his right, and still so claims and asserts his interest in the goods. He has never parted with the possession of the harnesses, and still rightfully holds them against the plaintiff and all the world. By his assertion of his lien, his right to retain the possession of the harnesses, for the payment of his charges, became vested, and must so continue as long as he shall retain that possession. He manifestly did not waive or intend to waive his lien, in consenting to hold the harnesses for the defendant. He only received and agreed to hold them subject to his own lien; and the defendant consented that Page should so receive and hold them, and that he would not as an officer interfere with them until that lien should be discharged; so that the lien was not affected or impaired by the arrangement. Townsend v. Newhall, 14 Pick. 332.

The gist of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. His possession is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to himself; or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatory, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure. But, where the general owner has parted with the actual possession, in favor of one who enjoys the exclusive right of present possession and enjoyment, retaining to himself only a reversionary interest, the possession is that of the lessee or bailee, who alone can maintain an action of trespass for a forcible

injury to the property. 1 Ch. pl. (7th ed.) 188, 195; 2 Gr. Ev., secs. 613, 614, 616, and authorities cited; Clark v. Carlton, 1 N. H. 110; Poole v. Symonds, 1 N. H. 289; Heath v. West, 28 N. H. 101; Moulton v. Robinson, 27 N. H. 550; Marshall v. Davis, 1 Wend. 109; Nash v. Mosher, 19 Wend. 431; Newhall v. Dunlap, 2 Shepl. 180; Gay v. Smith, 38 N. H. 171.

In this case, the plaintiff had parted with his possession of the harnesses, by delivering them to Page, to be cleaned and oiled. Page had cleaned and oiled them, and he thereby acquired, and had asserted the right, to retain them in his possession, even as against the plaintiff, until his charges for the labor and expense bestowed upon them should be satisfied. The plaintiff, then, had neither possession nor the right of possession in the harnesses, at the time of the alleged injury to them, and could not maintain trespass. Cowing v. Snow 11 Mass. 415, and authorities cited above.

It has been urged in argument that, although not liable for the original attachment, the defendant became liable by the subsequent demand of the plaintiff for the harnesses, and his refusal to deliver them up. But, if we are correct in the view, that the lien of Page having been asserted, gave him a vested right to retain the possession of the harnesses until that lien was satisfied or the possession parted with, and the lien had not been satisfied or the possession parted with by Page, as the case distinctly finds, then the plaintiff, at the time of the demand, had no right to the possession of the harnesses, and of course could not be injured by the refusal of the defendant to yield to him what he was not entitled to have.

The plaintiff, having at the time of the alleged injury to the harnesses by the defendant, neither the actual or constructive possession of them, but the same being then and still in the hands of his bailee, who had, and still has a vested right to retain them until the satisfaction of his lien thereon, there must be judgment on the verdict properly taken in the court below for the defendant.

Judgment upon the verdict.

[1] For cases on liens of agistor, factor, wharfinger, warehouseman, etc., see Gray's Cases on Property, Vol. I., 148-167, 189-213.

The right of lien was allowed (1) where it was the only remedy because the bailee had no express promise of recompense; (2) the

FOWLER v. LOCK, L. R. 7 Com. Pl. 272.

(1872)

The first count of the declaration stated that the defendant was a proprietor of cabs and horses, and was accustomed to let the same out for hire, and was possessed of a horse which was of a vicious and unmanageable disposition, dangerous, and not fit to be, and had never before been, driven in a cab; that the defendant, well knowing the premises, let the same out to hire to the plaintiff for the purpose of being harnessed to a cab and being therein driven by the plaintiff in the way of his, the plaintiff's occupation of a cab-driver, for reward to the defendant in that behalf, and fraudulently and wrongfully concealed from the plaintiff the fact of the horse being vicious, unmanageable and dangerous, not fit to be, and that it had never before been, driven in a cab: that the plaintiff had no notice or knowledge of that fact; and that, by reason of the premises, the horse, whilst so hired as aforesaid, and after the same had been harnessed to a cab for the purpose of being, and whilst being, driven therein by the plaintiff in the way of his said occupation as aforesaid, kicked, plunged, reared, and became unmanageable, and bolted and ran away and up an embankment, and overturned the cab; whereby the plaintiff was injured and prevented from following his occupation, &c.

Second count, that, in consideration that the plaintiff would hire of the defendant a horse of the defendant for the purpose of being harnessed to a cab and being therein driven by the plaintiff in the way of his occupation as a cab-driver, for reward to the defendant in that behalf, the defendant promised to let same to the plaintiff on hire for the purpose and on the terms

acquisition of the new remedy on an inferred promise did not displace the old remedy of lien; (3) it was extended to cases where the bailee had an express promise, but not to bailee's who had not had a lien prior thereto (agistor). 2 Harv. L. Rev. 61, 62.

Rights of bona fide purchasers.—8 Harv. L. Rev. 423; 3 Harv. L. Rev. 30.

Under the statutes of California, a sale of goods stored in a warehouse, to satisfy the lien of the warehouseman for unpaid storage charges, if the goods are other than perishable property, baggage, or luggage, can only be made at auction after such actual notice to the owner of the time and place of sale, and notice to the public usual at the place of sale, as is required in the case of a sale of pledged property. Stewart v. Naud, 125 Cal. 596.

aforesaid, and that the horse was reasonably fit and proper for the purpose of being driven by the plaintiff; that the plaintiff accordingly hired and the defendant let to hire to the plaintiff the said horse for the purpose and on the terms aforesaid; yet the horse was not then reasonably fit and proper for the purpose aforesaid, and after the same had been harnessed to a cab for the purpose of being driven, and whilst being driven therein by the plaintiff as aforesaid, kicked, &c., as in the first count.

Pleas, 1, to the first count, not guilty; 2, to the second count, that the defendant did not promise, as alleged; 3, to the second count, that the horse was at the time of the making of the supposed promise, reasonably fit and proper for the purpose in the second count alleged. Issue thereon.

The cause was tried before Byles, J., at the second sitting for Middlesex in last Michaelmas Term. The plaintiff is a cab-driver. The defendant is a cab-proprietor carrying on his business in Gray's Inn Road. On the 24th of June last the plaintiff, who had before driven cabs belonging to the defendant, applied to him for a cab and horse for the day, and the defendant agreed to supply them to him upon the usual terms, viz. that the plaintiff should at the end of the day hand over to the defendant 18s. of the day's earnings, retaining all over that sum for himself,—the day's food for the horse being supplied by the defendant, and the owner having no control over the driver after leaving the yard. The first horse which was offered to the plaintiff refused to go beyond the gate of the stable-yard; the second lay down in the road three of four times before he had got a mile from home; and then the defendant, pointing to a grey mare,—well-bred animal, rising five years, fresh from the country, having just been purchased at Horncastle Fair for 20£—said: "That is a likely one; you may try her if you like." The grey was accordingly harnessed to the cab, and the plaintiff started with her; but in a short time she kicked and plunged and the plaintiff lost all control over her, and ultimately the cab was upset and the plaintiff injured. There was evidence that it was usual, before putting fresh horses to cab work, for the defendant to try them in a gingle which in this case had not been done.

The defendant and his foreman were called; the former stated that, before the horses were put to, he told the plaintiff that they were all fresh horses; and both of them swore that they considered the grey a reasonably fit horse for a cab; and it was submitted that there was no evidence to sustain either count of the declaration; that it was not shown that the defendant was aware of the vicious disposition of the mare; and that the plaintiff, being the servant of the defendant, could not maintain an action against his master for an injury sustained by him whilst in his service, in the absence of evidence of some act of negligence of the master which conduced to it.

The learned judge directed a verdict to be entered for the defendant upon the first count; and upon the second he left it to the jury to say whether the horse was reasonably fit for a cab, and whether the accident was attributable to the vice of the horse or to the plaintiff's carelessness or want of skill.

The jury found that the horse was not reasonably fit to be driven in a cab, and that the accident was attributable to the horse; and they accordingly found for the plaintiff on the second count, damages 50*l*.

FRANCIS, in Michaelmas Term last, pursuant to leave reserved at the trial, obtained a rule nisi to enter a verdict for the defendant or a nonsuit, on the ground that the plaintiff was the servant of the defendant, and there was no hiring or letting of the horse, as alleged in the second count; or that, if there was such hiring or letting, there was no implied promise that the horse was reasonably fit and proper for the purpose as alleged; or for a new trial, on the ground that the verdict was against the weight of evidence,—the plaintiff to be at liberty, on the argument of the rule, to contend that the judge was wrong in telling the jury that there was no evidence to support the first count.

The Court being divided in opinion, the following judgments were delivered:—

GROVE, J. In this case the two questions which remained to be decided were,—first, was the plaintiff the servant of the defendant in such sense that, within the decided cases on that subject, he, the plaintiff, could not recover in respect of injuries sustained in the ordinary course of his employment,—secondly,

supposing the relation of master and servant in that sense did not exist, but that the relation was analogous to that of bailor and bailee, was there an implied contract by the former that the thing hired was reasonably fit for the purpose for which it was hired.

The evidence at the trial was that the plaintiff was the driver of a cab, and the defendant the cab-owner. The cabman in these cases pays 18s. a day, taking the risk of profit or loss upon himself. If he does not bring home or pay the 18s., he is not allowed to drive again; or, in the words of the defendant, "No money, no cabs." During the day the cabman is free to do what he likes with the horse and cab, provided he does not ill use them or misconduct himself to the public. On the occasion in question, the defendant, who supplied cab and horse, supplied first a horse which could not be made to go further than the exit of the stable-yard, secondly a horse which lay down three or four times, and thirdly, the horse which caused the injury to the driver in question by violent kicking and bolting.

There was evidence that the third horse was what is called "green," i. e. fresh from the country, and untried, and that it was usual in such cases to try the horse first in what is called a gingle.

The learned judge held that there was no evidence of knowledge to support the first count, and left the case to the jury reserving the question above mentioned. The jury found for the plaintiff, damages 50£. With this verdict the learned judge was not dissatisfied and this Court held on the argument that he was right as to the want of evidence of scienter.

It was contended on behalf of the defendant, on the authority of the cases of Morley v. Dunscombe and Powles v. Hider, that the plaintiff was the servant of the defendant, and that, within the decisions on the subject, the master was not liable to the servant for injuries sustained in the ordinary course of service. On the other hand, it was argued on behalf of the plaintiff that those were cases where a third party, viz. one of the public, was injured; and that, although the cab-owner might, by reason of statutable provisions and responsibilities to the public, be liable to a person injured when riding in the cab, yet that they were not in point as to the relations of cab-owner and cab-driver; and

that these were to each other as bailor and bailee on a contract of hiring. It was further contended for the defendant that, even if the latter relation was the true one, there was no implied promise by the cab-owner that the horse supplied was reasonably fit for the purpose for which it was used, and, if so, the defendant was not liable.

On both these reserved questions, I am of opinion that the judgment should be for the plaintiff.

The non-liability of master to servant in cases where a stranger would be liable, appears to be founded on the servant's undertaking or subjecting himself to the ordinary risk of his service, the "dangers" of which "he is just as likely to be acquainted with as the master." These latter words are used in the judgment of the Court of Exchequer delivered by Lord Abinger in the leading case on the subject, Priestley v. Fowler, in which case the injury was occasioned by the breaking down of the overloaded van; and the judgment went on to say: "The plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others employed under the same master, than any recourse against his master for damages could possibly afford." In Dynen v. Leach, where the injury was by the slipping of a clip to which a sugar-mould was attached, Bramwell, B., says,—and similar expressions fell from other members of the Court.—"The workman is as well acquainted as the master with the nature of the machinery, and voluntarily uses it." These criteria, I do not think apply to the present case. The cabman could not know the qualities of the different horses he was or might be from day to day supplied with; nor was he the cab-owner's servant, in the sense of taking upon himself perils the nature or extent of which he had no reasonable means of ascertaining.

In Powles v. Hider, relied on for the defendant, where the question was more fully entered into than in Morley v. Dunscombe, the judgment proceeds on the relation to the public of the cab-owner. It says: "Looking to the position of the proprietor and the driver of the cab under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor is liable." After discussing the question of wages, to which I shall presently refer, the judgment proceeds to contrast that case with the hiring of a job-carriage, "where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor." It then considers the provision of the statute 1 & 2 Wm. 4, c. 22, s. 20, viz. that every hackney-carriage shall at all times have upon it a plate with the Christian name and surname of the proprietor of such carriage. The Court goes on to say, "and the cab in question had upon it a plate with the name and surname of the defendant as the proprietor. The proprietor who applies for and accepts a license to which such a condition is annexed, and employs his cab under it, must be considered to hold himself out to the world as the proprietor; and he must incur the liabilities of the proprietor to all who use the cab with the authority of the driver in the ordinary course of dealing." After referring to 6 & 7 Vict. c. 86, it says, "It would be most inconvenient and unjust towards the public if an action such as the present, brought against one who proclaimed himself to be the actual proprietor of the cab when it was engaged by the plaintiff, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver and the proprietor, in which the earnings of the cab are to be divided between them."

I think it sufficiently appears from the above that what the Court had under its consideration in that case was the relation and responsibility of the cab-proprietor to the public; and that it had not in view the nature of the contract between the cab-owner and driver or cabman. Indeed, this seems to be excluded by that part of the judgment last quoted. The Court, it is true, considered the payment of a fixed sum as a mode of compensation

for the cabman's labor: and no doubt this may be so; but the payment by the person who uses the horse and carriage to the proprietor of it, though not inconsistent with such a view, cannot, I think, be regarded as evidence of a contract of service, but rather (primâ facie, at least,) as more consistent with that of a contract of hiring.

In this case, therefore,—where the cabman is under no control as to his movements by the cab-owner, where he may make special bargains to the public, where he does not and cannot reasonably be expected to know the risks he encounters, where he primâ facie pays instead of receives, where he is not carrying out his master's orders, where the perils are unknown to him and change from day to day, where there is no notice of dismissal, but only a refusal to supply cab and horse on non-payment, and where there are no correlative duties beyond those of bailor and bailee, and statutable duties of each respectively to the public,—I feel obliged to come to the conclusion that the cabman is not the servant of the cab-owner in the sense (to use the term above quoted) of rendering the latter exempt from liability to the former in cases where a party not bearing the relation of master to servant would be liable.

It remains for me to consider the second point, i. e. assuming the relation of the parties to be in the nature of that of bailor and bailee, is there an implied contract by the former that the thing supplied is reasonably fit for the purpose for which it is hired. I am of opinion that there is.

Even in the case of master and servant, the House of Lords has held, in appeals from Scotland, that the master is bound to take all reasonable precautions for the safety of his workmen, and is liable for accidents occasioned by his neglect towards those whom he employs; and the law of England is there stated (obiter) to be the same as that of Scotland: Paterson v. Wallace; Brydon v. Stuart.

In Chew v. Jones, it is laid down at nisi prius, by Pollock, C. B., that, "if a horse or carriage be let out for hire for the purpose of performing a particular journey, the parties letting warrant that the horse or carriage, as it may be, is fit and proper and competent for such journey." He says, however, further on: "It is not the case of bailee, but of a contract in which the plain-

tiff impliedly warrants that his horse is fit to do a certain journey."

In the judgment of Lord Abinger in Sutton v. Temple, it is said: "If a carriage be let for hire, and it breaks down on the journey, the letter of it is liable and not the party who hired it. So, if a party hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods,—such as are fit to be used for the purpose intended? Undoubtedly, the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such that an obligation is imposed on the party letting for hire to furnish that which is proper for the hirer's accommodation." Smith v. Marrable, which was the case of letting a house infested with bugs, and where the Court said that there was an implied condition on letting a house that it was reasonably fit to be inhabited, was distinguished from the case then under consideration, and therefore so far upheld. The words first quoted from this judgment seem exactly to meet the present case: and I am consequently of the opinion that, where there is a hiring of goods, not agreed to as specific chattels, and where, as here, the person hiring has no reasonable means of ascertaining their quality, the hirer is bound to supply such as are reasonably fit for the purpose.

My judgment is therefore on both points for the plaintiff, and that the rule should be discharged.

BYLES, J. I also am of opinion that the rule to enter non-suit should be discharged.

It may be useful to consider in what relation the parties would have stood to each other before the Hackney Carriage Acts were passed, or in places where they do not apply. Suppose that in a country town, in the time of Charles I., the owner of a horse and cart contracted to allow another man to have the entire and exclusive personal use and control of them, at so much a week or so much a day, for the purpose of carrying, for the driver's profit, passengers or goods within the limits of the town, but without reserving to himself (the owner) any right to direct where the horse and cart should go, provided they were used within the prescribed limits and were returned within the agreed time,— what in that case would have been the nature of the

relation between the parties? I should have thought it would not have been that of master and servant, but would have been that of bailor and bailee. The contract would fall within that class of bailments called "Locatio, i. e. contractus quo de re fruenda vel faciendâ pro certo pretio convenit." It may not be necessary to the existence of a bailment of this sort that the possession of the chattel should vest in the bailee; it is enough if he have only the use and enjoyment of it. It would in either view still be a bailment, though he should be obliged to use it within the prescribed limits, and to drive it himself personally, and not to allow any one else to do so.

Such I should have thought would have been the relation existing between the parties in this case, but for some expressions used by Lord Campbell in the case of Powles v. Hider, which expressions, however, not being necessary to the decision of the case, are perhaps extrajudicial; for, it must be recollected that the case of Powles v. Hider was decided on the Hackney Carriage Acts there cited, and on the relation created by those Acts as between the proprietor and the public. Here, on the contrary, we are dealing with the rights and liabilities of the proprietor and driver inter se. The driver, as between the cab-owner and himself, seems to me to have the complete and exclusive control and disposition of the vehicle within a certain district, and not to be a servant of the proprietor, and therefore by the terms of the contract entitled to be furnished with a suitable, at least with a quiet or manageable, horse.

But, even on the supposition that the relation existing between these parties inter se was not analogous to that of bailor and bailee, but was that of master and servant, I think, nevertheless, that there was evidence of the defendant's liability; for, in this case, there was the personal interference and superintendence of the master, the now defendant, in the supply of the horse, and therefore evidence of his personal negligence causing injury to his servant, by sending that servant out with an untried, vicious, and dangerous horse, not reasonably fit and proper for the work; the master having had the means of knowing the horse's character, and the servant having had no such opportunity.

In Ormond v. Holland, Lord Campbell and Crompton, J., both state, as a qualification to the general rule laid down in Priestley v. Fowler, that the master is liable if there be personal negligence on his part.

Moreover, it has been held, and very recently in this Court in Warren v. Wildee, that a master is liable to his servant if he expose the servant to unreasonable risk, and the servant be thereby injured, and that this is a question which ought to be left to the jury.

WILLES, J. In this case the plaintiff, who was a cabman driving a horse and cab provided by the defendant, a cab-master, the cabman keeping the earnings of the cab, and paying so much a day to the cab-master, upon the terms usual in the trade, and which were of the same character as those commented upon in Powles v. Hider, was hurt in consequence of the horse running away; and he brought his action for damages.

The declaration contained two counts. One count alleged that the defendant knowingly supplied an unfit horse; this, however, was rightly negatived at the trial, and the verdict thereupon is for the defendant. The other count was upon an alleged implied contract by the defendant with the plaintiff, upon an alleged bailment of hire of the cab and horse, that the horse was fit for the purpose, which in fact he was not. Upon this count the plaintiff had a verdict, subject to the opinion of the Court upon a point reserved; and the question which we have to determine is, whether this contract was to be implied from the employment.

The character of the relation between the parties was much considered in Powles v. Hider, which decided that the cab-master was answerable to third persons for the acts of the cab-driver, as his servant or agent, and that the cabman was not the bailee or hirer of the cab, in which case he, and not the cab-master, would have been liable. In delivering the judgment of the Court, Lord Campbell distinctly stated this to be the opinion at which they had arrived; and in deciding this case against the defendant we should seem directly to overrule the reasoning of the Court of Queen's Bench. * * *

That case has remained ever since to the present day the unquestionable guide of the Courts, both as to the decision and as

to the reasoning upon which it was founded; and the relation between the parties as thereby established was, that the cabman drove the cab for the cab-master as a person employed by him at his risk, and that the payment of the fixed sum was part of a mode of paying wages out of the earnings of the cab, arranged so as to secure to the master a fair return and to the driver a fair rate of wages dependent upon his diligence. The possibility that the cabman might become liable to pay the fixed sum though he did not use the cab, or though he made less than the stipulated sum, was looked upon as a remote possibility not contemplated by the parties, who were considered to have bargained with reference to the average earnings. In such an engagement the cabman himself is to drive, which is a confirmatory fact to shew that the engagement is personal with him for his service; and it is anticipated that he will, in return for such service, make as much as will pay him fair wages over and above what is secured for the master.

The question is somewhat like that which has arisen in case of servants of a partnership receiving a share of the profits, with this distinction, that, whether in the case of a servant or in the case of a partner contributing his labor as against capital advanced by another to the earning of joint profit, whether fixed or not, an agency is created in respect of which the contributor of the capital is a principal or co-adventurer, and the contributor of the labor is a servant or other co-adventurer, each taking his share in profit and risk. A person standing in such a position as employer or co-adventurer is, according to a well-known rule, only answerable for fraud or misconduct, and the person employed by him takes the ordinary risks of the employment.

It would be a remarkable hardship to hold that the cab-master is not a letter out of the cab, but a principal, and liable for the cab-driver as his servant or agent as regards third persons, and yet that he is not an employer, but an independent letter to an independent hirer, as between him and the cabman, so as to be liable to the latter as upon a warranty which is not implied between master and servant or agent, or between co-adventurers. * * *

It is unnecessary to give an opinion, and I offer none, upon the question whether there is an absolute warranty of fitness

as between letter and hirer, in the case of an ordinary bailment of hire. It is enough to say that in the present case there can be no such warranty, because there was no such bailment.

If the cab-owner had been guilty of knowingly sending out an unfit horse with a driver who was not aware of the fact, there would have been a case of liability; but this state of facts was negatived at the trial. The remaining alleged ground of liability is therefore within the ordinary risk of the employment which the plaintiff undertook.

My learned Brothers Byles and Grove are of a different opinion, and therefore these scruples of mine are of small weight; but I have not been able to get rid of them. In accordance with the judgment of the majority of the Court, the rule to enter a nonsuit or a verdict for the defendant must be discharged.

Rule discharged.[1]

HORNE & WIFE v. MEAKIN & ANOTHER. 115 Mass. 326.

(1874)

Tort with a count in contract to recover damages for an injury to the female plaintiff, by being thrown from the defendants' carriage. Trial in the Superior Court before Putnam, J., who allowed a bill of exceptions in substance as follows:

The case was submitted to the jury only upon the amended count in tort hereafter mentioned. It appeared in evidence that on Saturday, June 29, 1872, the father of James Horne, one of the plaintiffs, who lived in Canton, went to the defendants, who keep a livery stable in Canton, and engaged a horse and carriage for his son, to be used in a funeral procession for the next day. The deceased was the husband of a sister of the plaintiff, James. The plaintiffs, their child, and its grandmother rode in the carriage on Sunday from the house to the graveyard, and, on their return home, after stopping on the way at the house of a friend to get a glass of water, the horse became frightened at some object and ran away. The carriage was broken, and the female plaintiff was thrown out and injured. Notice was thereupon sent to one of the de-

[1] 25 Harv. L. Rev. 660; Myers v. Tri-State Auto Co., 140 N. W. R. 184.

fendants, who came and took home his horse and carriage.

The father testified that as agent of his son, who had requested him to hire a horse for him to go to the funeral, he went to the defendants' stable and engaged a horse for his son, kind and gentle, to go in a funeral procession with his family on the next day, Sunday.

The plaintiff James testified that he did not send his father to these defendants to engage the team. The father testified further that he went on Sunday to the stable and got the team, which was delivered to him by one of the defendants, the same one of whom he had engaged the horse and carriage, and the same team which he had engaged the day previous, and drove it to his son's house, when his son took it, and went with his family to the funeral; that the man told him the horse was good and gentle, and would stand without hitching. The plaintiff, James, testified that on the way home the horse became frightened from some cause unknown to him, and ran at great speed across two railroad tracks, and the carriage then upset and threw them out; that he was used to driving a horse, and exercised due care. The plaintiffs also offered evidence tending to show that the horse had run away the day previous and on other occasions before and after the accident, that he was easily frightened, and would run away apparently without any reason, and that he was not a suitable horse to be let for the purpose indicated. The plaintiffs also offered evidence of the insecurity of the carriage.

The defendants offered evidence conflicting with that of the plaintiffs, and also tending to show that they had contracted with the father on Saturday, for a horse for him, but not for his son, and a different horse from the one which the plaintiffs had; that the father came on Sunday and asked for the horse which had been engaged, and while they were harnessing him, the father took a horse and carriage standing in the yard, which had been engaged by another person, supposing that it was the one intended for him, and without the knowledge or consent of the defendants, or any of their servants; that when the horse engaged by the father was got ready, they brought him out, and found that the father had driven off with the wrong horse.

The court instructed the jury, upon the whole evidence, that,

the defendants being public stable-keepers in the town of Canton, if the plaintiff, James W. Horne, hired of them, through his father, a horse and carriage for the purpose of taking himself and his family to the funeral, they were bound to furnish him with a horse and carriage reasonably safe for such a purpose; that if the horse was not a safe horse, but was accustomed to run away without any apparent cause, and the plaintiff was himself a careful driver, and exercised due care on this occasion, and the accident would not have happened except for the fault of the horse in the particular named, the plaintiff could recover in this action, upon the amended count which was to be filed, for the injury occasioned to his wife. To these instructions, and to others given in explanation of them to the jury, no exception was taken.

The defendants then requested the court to rule:

2. That the plaintiffs to recover, must show that the horse was not a suitable one to be let under the circumstances. [And, if the jury find he was unsuitable, the plaintiffs cannot recover unless they prove that the defendants knew the horse was thus unsuitable.] The court gave all of this ruling but the portion in brackets, but declined to give that part, and ruled that whether the defendants knew or not that the horse was unsuitable, was immaterial, and of no consequence under the amended count.

3. That if the jury find that the horse was let to the father, and the credit given to him, the plaintiffs cannot recover damages in this action. The court so ruled, and added the words, "unless the jury find it was hired by the father for the use of the son, and that the defendants knew that it was to be used by the son to take his wife and family to the funeral."

4. If the jury find that the highway was defective, and this was the principal cause of the accident, and the accident occurred through no fault of the defendants, the plaintiffs cannot recover against the defendants. The court so ruled with the addition of the words, "or of the horse," after the words, "no fault of the defendants."

5. That upon the evidence disclosed in this case, the plaintiffs cannot recover on the count in tort. The court so ruled.

but ruled, that the plaintiffs might recover upon the amended count in tort.

6. If the jury find that the horse started by being suddenly frightened by a dog, or that the accident happened by any defect in the railroad tracks or highway, the plaintiffs cannot recover. The court gave this ruling with the addition of the words, "And through no viciousness of the horse" after the word "highway."

7. If the jury find that the father took the horse designed for another, or without the consent of the plaintiffs, they cannot recover. The court so ruled, but added the words, "Unless the jury find that the defendants knew of the mistake, and could have notified the plaintiffs of the mistake and did not do so."

There was no evidence in the case that the defendants did or did not notify the plaintiffs, or of any effort to notify the father, who lived in the village.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions to the rulings and refusals to rule, so far as they conflict with the rulings asked for.

DEVENS, J. * * *

2. It was the duty of the defendants to furnish a suitable horse for the purpose for which it was hired, and a part of their contract that they would do so. If they have negligently furnished one which was unsuitable, and injury has been occasioned thereby, it is not a defense that they did not know that the horse was unsuitable.

3. It was also correctly ruled that if the contract was made by the father for his son, and the purpose for which the horse was to be used by the son (that of taking his wife and family to the funeral of his brother-in-law) was known to the defendants, then upon proof of other necessary facts an action of tort might be maintained for the injury to the wife.

4. The addition made by the judge to the fourth request was necessary, in order that the jury should understand that the defendants were to be held responsible for damages arising from the unsuitableness of the horse, in accordance with his ruling which the defendants have objected to by their second exception. * * *

6. If the court considered that the tendency of the sixth instruction as requested was to draw the attention of the jury from the point upon which the case seemed to rest, it was proper, after giving it, to add, "and through no viciousness of the horse," as even if the injury was occasioned by the combined causes of the viciousness of the horse, and sudden fright or the defective way, the defendants would be responsible.

7. The last instruction requested was properly modified by the judge. It appears by the the bill of exceptions that the parties lived in the same village. Even if the father took the horse by mistake, yet if the defendants knew of the mistake, and could with reasonable effort have notified the plaintiffs of it, and failed to do so, it must be inferred that they assented to any responsibility they might be subjected to, if injury was occasioned by the fact that the horse taken was unsuitable for the purpose for which one had been hired.

Exceptions overruled.

TAUSSIG ET AL. v. BODE & HASLETT, 134 Cal. 260. (1901)

Appeal by defendant from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial.

BEATTY, C. J.—(The defendant is the proprietor of a bonded warehouse in the city of San Francisco. He received sixty-four barrels of spirits from the plaintiffs, on the 20th of January, 1896, and stored the same in his warehouse. About the 4th of March it was discovered that some of the barrels were leaking. Plaintiffs were notified, and upon examination they found that the amount of loss was 181 1-2 gallons, of the value of $434.50. Plaintiffs sued to recover this amount. The first count of their complaint set forth a cause of action for negligence, the second, for non-delivery. The jury found a verdict for the plaintiffs. The defendants had given plaintiffs a receipt on which was a notice that loss by leakage, etc., was at the owner's risk.)

There is a controversy as to the burden of proof, but as to this little need be said. We agree with respondents, that in a

case of this character, proof of the deposit and of failure of the bailee to redeliver in accordance with terms of the contract, makes a prima facie case, and that the burden is upon the warehouseman to excuse the failure to redeliver; but we also agree with appellant, that when, as in this instance, he shows a return of the packages stored, and that the contents have been lost by leakage, the burden shifts to the plaintiff to prove affirmatively that the leakage was caused by the fault of the bailee. This was the principle decided in Wilson v. Southern Pac. R. R. Co., 62 Cal. 164, and it is entirely reasonable and just. But even in this view there was evidence sufficient to sustain the verdict for plaintiffs, if the instructions of the court correctly stated the law. * * *

Counsel for the respective parties differ as to the effect of the notice printed on the face of the receipt, that loss by leakage was at the owner's risk. Respondents claim,—1. That the notice is no part of the contract; and 2. That even if it is treated as a binding stipulation, it could not exempt the appellant from liability for loss by leakage, which, as they contend, might have been discovered and prevented if the casks had been inspected from time to time, or if they had been piled in a single tier, leaving both ends exposed to view. Both of these propositions are controverted by the appellant, and upon their determination the case seems to depend. We think it clear that the notice is a part of the contract. It was written plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is, that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do. Assuming, then, that they read the receipt, and, whether they did or not, that they are chargeable with knowledge of its contents, they had fair warning that any loss by leakage was at their risk, or in other words, that appellant declined all responsibility for loss by leakage. Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them, as one of the terms of the con-

tract. The cases cited by counsel in which it has been held that notices printed or stamped on bills of lading, but not signed by the consignors, do not exempt common carriers from their common-law liability are not in point. They rest upon the peculiar nature of the public duties of common carriers, and the public policy of preventing them from limiting their liability by mere notices not expressly assented to by the shippers. The principle of those decisions is very clearly stated by Mr. Justice Davis, delivering the opinion of the Supreme Court of the United States in Michigan Central R. R. Co. v. Mineral Springs Mfg. Co., 16 Wall., at page 328. The case of warehousemen is entirely different. There is no public policy to be infringed by stipulations limiting their liability for loss or deterioration caused by the inherent qualities of the articles stored, or by defects in the vessels containing them. They are not bound to receive articles offered for storage, and may make such terms as they choose to impose as conditions of their contract. In this case we think that it was clearly one of the terms of appellant's contract that it should not be responsible for loss by leakage. This, of course, would not exempt it from liability for leakage due to its fault, but did exempt it from the duty of watching these casks to detect leakage caused by defects in the casks, or resulting from any cause other than improper handling or storage. If prudence required the casks to be watched or inspected from time to time to see whether they were leaking, that duty devolved upon the respondents, not upon the appellant. And there was nothing to prevent respondents from making such inspection as often as they desired. * * * In view of the contract, it was the duty of respondents, and not the duty of the appellant, to guard against latent defects in the casks, and against the effects of shrinkage.

The judgment and order of the superior court are reversed.[1]

[1] Minnesota, etc. Co. v. St. Paul, etc. Co., 75 Minn. 445; 20 Harv. L. Rev. 299-303.

Increase of liability by contract.—Pope v. Farmers' etc., Co., 130 Cal. 139.

Burden of proof.—Taussig et al. v. Bode & Haslett, 134 Cal. 260; Wood v. Remick, 143 Mass. 453; Maleny v. Taft, 60 Vt. 571. See Doyle v. Mays, 4 Pa. Sup. Ct. 593.

4 TERMINATION.

COBB v. WALLACE, 5 Cold. (Tenn.) 539.

(1868)

Action for value and hire of a barge on counts for breach of contract in failing to redeliver, for negligence in keeping and for conversion of the barge. Verdict for defendants.

By COURT, ANDREWS, J. * * * The evidence in the record tends to show the following state of facts:—

In December, 1863, the plaintiffs' barge being at Hawesville, Kentucky, a place on the Ohio River, and having then on board a load of coal, the defendant purchased the coal from the plaintiffs, and at the same time hired the barge at the rate of three dollars per day, for the purpose of conveying the coal to Nashville. These bargains were made in parol between the defendant in person and D. Looney & Co., the agents of the plaintiffs. There is evidence tending to prove that this parol contract of hiring was that the defendant should employ the barge to convey said load of coal to Nashville, and that the barge should be returned to the plaintiffs, at Hawesville, as soon as the coal could be taken to Nashville and discharged, and that no authority was given to defendant to use the barge in any other manner, or for any other purpose. Soon after the making of these contracts, the barge with its cargo of coal was delivered to J. W. Ross, the agent of the defendant, who executed and delivered to D. Looney & Co. the following receipt:—

"HAWESVILLE, December 12, 1863.

"Received from D. Looney & Co., one barge, Aurora, No. 8, containing 1,166 bushels of coal, which I agree to pay D. Looney & Co., at Louisville, at the rate of twenty cents per bushel. And I further agree to hire said barge, Aurora, No. 8, and pay D. Looney & Co., three dollars per day from this date until the barge is returned to Hawesville, in good order.

"J. W. Ross, agent of W. B. Wallace."

The barge arrived at Nashville, and was unloaded early in January, 1864. The defendant then retained it, and for some length of time employed it in the business of transporting wood upon the Stone River. Looney, one of the plaintiffs' agents,

called upon defendant frequently, both by letter and personal application, for the return of the barge, within six weeks of the hiring, and frequently after that time, until he heard of its seizure, as hereinafter stated. About the middle of April, 1864, the defendant sent the barge from Nashville in charge of his agent, on its way to Hawesville, for the purpose of delivering it to the plaintiffs. But on its way thither the barge was seized by persons in the military service of the United States. * * *

But we think that the circuit judge also erred in his construction of the writing in question, even if we were compelled to consider it as the only evidence of a contract in the case. He instructed the jury, in substance, that under it the defendant had it at his option to say when the contract was at an end, and might continue to use the barge so long as he paid the stipulated hire; and that the contract for the hire would not be terminated until the defendant so elected.

In cases of bailment, where the contract is indefinite as to the time of its continuance, the bailee has not the arbitrary and exclusive right to determine at what time it shall terminate. If the bailment is for an explicitly declared purpose, it terminates whenever that purpose is accomplished. If the time be not fixed by agreement, or by the nature of the object to be accomplished, then the bailee must return the property whenever called upon, after a reasonable time; and what time is reasonable must be determined by the circumstances of each particular case: 2 Parsons on Contracts, 128, 129. And therefore to recur again to a question already discussed, if the written contract does not in its terms specify the time of its continuance, parol evidence becomes necessary in order to enable the jury to determine what length of time is reasonable under the circumstances.

Still another objection may be urged against the charge of the circuit judge in this case. The jury were instructed, in substance, that the fact that the plaintiffs had written letters to the defendant, demanding the boat, after the commission of the act claimed by the plaintiffs as a conversion, was a waiver of the conversion.

We are not aware of the existence of such a doctrine. If the owner, with knowledge of the facts constituting the conversion,

again take possession of the property converted, as owner, this will be evidence of a waiver of the conversion: Traynor v. Johnson, 1 Head, 51. But we know of no case where it is held that a demand on the part of the owner for the return of his property, or any other effort made by him for its recovery, would be of itself a waiver of a previous conversion. The law attaches no such penalty to attempts by the owner of wrongfully appropriated property to recover its possession. Demand must be made in a large class of cases before an action can be maintained for conversion. Still the demand and refusal do not in themselves constitute the conversion, but are only the evidence of it: 2 Greenl. Ev., sec. 644; 1 Chitty's Pleading, 158. And it cannot be held that the demand, which the law requires to be made before suit, should itself operate to bar the right of action. If the defendant, without the consent of the plaintiffs, and in violation of his contract, detained the barge, and employed it in a different place, and for a totally different purpose from that contemplated by the contract, the jury would have been authorized to find him guilty of a conversion, independently of the evidence furnished by repeated demand for its return, and the defendant's refusal to return it: 2 Greenl. Ev., sec. 642. See the cases in Tennessee, collected in 1 Heiskell's Dig., 237. And we think such conversion would not be waived by a subsequent demand of the property.

The judgment of the circuit court must be reversed, and the cause remanded for a new trial.[1]

[1] Termination by death of bailee at will.—14 Harv. L. Rev. 157. Right of bailor to enter for recaption of goods.—10 Harv. L. Rev. 192.

CHAPTER VII.

DEVELOPMENT OF THE LAW OF PUBLIC CALLINGS

ANONYMOUS, Y. B. 22 Lib. Assis., pl. 41.

(1348)

1. de B. complains of his writ that G. de F. on a certain day and year at B. upon Humber had undertaken to carry his mare taken on his boat over Humber water safe and sound; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished, to his wrong and damage. &c.

Richmond. Judgment of the writ; for he does not allege any tort in us; he only proves that he would have an action by a writ by way of covenant, or (not?) by way of trespass; wherefore &c.

BANKWELL, J. It seems that you committed trespass when you overloaded the boat, whereby his mare perished, &c.; therefore answer.

Richmond. Not guilty.

ANONYMOUS, Y. B. 19 Hen. VI. 49, pl. 5.

(1441)

Writ of trespass on the case against one R., a horse doctor, to the effect that the defendant assumed to him at London to cure his horse of a certain trouble, and that he then so negligently and carelessly gave the medicines, etc., that the horse, etc. * * *

PASTON, J. You have not shown that he is a common surgeon to cure such horses, and, therefore, although he has killed your

horse by his medicines you shall have no action against him without an assumpsit.

ANONYMOUS, Keilw. 50, pl. 4.

(1450)

Note, That it was agreed by the court, that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not sound in covenant. * * * Note, That in this case a man shall have no action against innkeeper, but shall make complaint to the ruler, by 5 Ed. IV. 2; contra, 14 Hen. VII. 22.

ANONYMOUS, Y. B. 10. Hen. VIII., pl. 14.

(1494)

HUSSEY, C. J., said that victualer shall be compelled to sell his victual if the vendee has tendered him ready payment, otherwise not. Quod Brian, C. J., affirmavit.

JACKSON v. ROGERS, 2 Show. 327.

(1683)

Action on the case, for that whereas defendant is a common carrier from London to Lymmington et abinde retrorsum and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by JEFFERIES, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

Note, That it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.[1]

[1] San Francisco, etc. Ry. Co. v. Caldwell, et al., 31 Cal. 367. Power of legislature over contracts of employers and employees.—

HOLMES, THE COMMON LAW, 183-186.

But there was another way besides this (i.e. assumpsit) by which the defendant could be charged with a duty and made liable in case, and which, although less familiar to lawyers, has a special bearing on the law of carriers in later times. If damage had been done or occasioned by the act or omission of the defendant in the pursuit of some of the more common callings, such as that of a farrier, it seems that the action could be maintained, without laying an assumpsit, on the allegation that he was a "common" carrier. (Paston, J., in Y. B. 19 Hen. VI. 49). The latter principle was also wholly independent of bailment. It expressed the general obligation of those exercising a public or "common" business to practise their art on demand, and show skill in it. "For," as Fitsherbert says, "it is the duty of every artificer to exercise his art rightly and truly as he ought."

When it had thus been established that case would lie for damage when occasioned by the omission, as well as when caused by the act, of the defendant, there was no reason for denying it, even if the negligent custody had resulted in the destruction of the property. From this it was but a step to extend the same form of action to all cases of loss by a bailee, and so avoid the defendant's right to wage his law. Detinue, the primitive remedy, retained that mark of primitive procedure. The last extension was made about the time of Southcote's Case. But when the same form of action thus came to be used alike for damage or destruction by the bailee's neglect and for loss by a wrong-doer against whom the bailee had a remedy over, a source was open for confusion with regard to the foundation and nature of the defendant's duty.

In truth, there were two sets of duties,—one not peculiar to bailees, arising from the assumpsit or public calling of the

8 Harv. L. Rev. 59; 16 Harv. L. Rev. 518.

Amendment of charter by legislation.—10 Harv. L. Rev. 128.

Are railways obliged to allow erection of elevators? 10 Harv. L. Rev. 451.

Maximum rates.—12 Harv. L. Rev. 50.

Adequate facilities (loss resulting).—21 Harv. L. Rev. 49, 56.

Railways discharge part of the duties of government. Rogers Locomotive, etc. Works v. Erie Ry., 20 N. J. Eq. 379; Cook (Corp.) § 7, § 891.

defendant, as just explained; the other, the ancient obligation, peculiar to them as such, of which Southcote's Case was an example. But any obligation of a bailee might be conceived of as part of a contract of bailment, and after assumpsit had become appropriated to contract, and the doctrine of consideration had been developed, (both of which had happened in Lord Coke's time,) it seemed unnecessary to distinguish nicely between the two sets of duties just mentioned, provided a consideration and special promise could be alleged. Furthermore, as formerly the defendant's public calling had the same effect as an assumpsit for the purpose of charging him in tort, it seems now to have been thought an equally good substitute for a special promise, in order to charge him in assumpsit. In Rogers v. Head (Cro. Jac. 262; 8 Jac. 1), the argument was, that to charge one in assumpsit you must show either his public calling at the time of the delivery, or a special promise on sufficient consideration. This argument assumes that a bailee who received goods in the course of a public employment, for instance as a common carrier, could be charged in this form of action for a breach of either of the above sets of duties, by alleging either his public calling or his reward and a special promise.

ALLNUT v. INGLIS, 12 East, 527.

(1810)

LORD ELLENBOROUGH, C. J. The question on this record is whether the London Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but, if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reason-

able terms. The question then is, whether circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way; where the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either "because they are the wharfs only licensed by the queen, or because there is no other wharf in that port, as it may fall out: in that case (he says) there cannot be taken arbitrary and excessive duties for cranage, wharfage, &c.: neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter." And then he assigns this reason, "for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only." Then were the company's warehouses juris privati only at this time? The legislature had said that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company, but for the good of trade. The first clause (43 Geo. 3, c. 132, the general warehousing act) says that it would greatly tend to the encouragement of the trade and commerce of G. B., and to the accommodation of merchants and others, if certain goods were permitted to be entered and landed and secured in the port of London without payment of duties at the time of the first entry: and then is says that it shall be lawful for the importer of certain goods enumerated in table A. to secure the same in the West India dock warehouses: and then by sect. 2 other goods enumerated in table B. may in like manner be secured in the London dock warehouses. And there are no other places at present law-

fully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses, were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction; and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.

SHEPARD v. THE MILWAUKEE GAS LIGHT CO., 6 Wis. 539.

(1858)

By the COURT, SMITH, J., The material facts in this case are as follows: The defendant is a chartered company, or corporation, having the exclusive right to manufacture and sell gas for

the purpose of lighting the city of Milwaukee, and the places of business and residences of the inhabitants of said city, according to the terms of a contract entered into originally between John Lockwood and said city, and in conformity with the duties and obligations resulting from the act of its incorporation.

The plaintiff was a merchant doing business on East Water street, in said city, along which the gas pipes of the company were laid, and had fitted up his store with the necessary pipes, tubes, burners, and apparatus for lighting it with gas. He then applied to the company to furnish him with gas, and tendered five dollars in advance payment therefor. The company, before they would furnish the gas, required the plaintiff to sign what purported to be an agreement, and was, at least, a promise to take gas according to the terms and conditions contained in the printed rules and regulations of the company, which were introduced in evidence. This the plaintiff refused to sign, and for that reason, and none other, the company refused to furnish him with gas. The plaintiff then brought his action to recover damages of the said company for such refusal in a justice's court, claiming damages to the amount of $100, where the defendant obtained judgment, and the plaintiff appealed. The county court reversed the judgment of the justice, and gave judgment for the amount claimed and costs. The defendant now brings the case here by appeal to be reviewed. * * *

The question is, whether the citizen, willing to submit and conform to all such regulations as the company might rightfully impose, was entitled to demand of and be supplied with gas by the company? In other words, was not the company bound to sell their gas at the usual rates to all and every citizen of Milwaukee who was prepared by pipes and the necessary fixtures for its consumption and use, upon compliance with such conditions and regulations as the company might rightfully impose?

In considering this question it is not deemed necessary to examine critically the contract of Lockwood with the city, or the charter of the gas company in detail. It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that, hence, the only

means of supply available to the citizens was through the agency of the company. It is within the everyday experience of us all, and, hence, within the judicial knowledge of the court, that the manufacture and supply of inflammable gas for the purpose of lighting cities, stores and dwellings, is not a domestic or family manufacture. It is carried on either by public or associated capital, and is dependent for its profit upon general consumption. Corporations of this kind are not like trading or manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world. Their product is designed for the consumption of the immediate community in which the manufacture is wrought. It is not a trading corporation, for its product depends exclusively upon home consumption. If gas were an article of merchandise, and could be bottled or packed up, and imported or exported like soap, candles or hats, to be distributed to the various markets of commerce, there might possibly be claimed for it the character of merchandise, or manufactures partaking of that attribute. But such is not the fact. * * *

But it is asked, would a soap and candle factory, or a hat or carriage factory, with the privilege of laying pipes in the public streets, make it a public corporation, and oblige the company to furnish soap, candles or carriages to any citizen upon tender of a fair compensation? Perhaps not. The citizen could procure his soap, candles and carriages elsewhere. These are all articles of trade, capable of transportation from place to place, and, as is sometimes alleged, the incorporation of companies for their manufacture, does not interfere with the rights or privileges of private citizens. But suppose the citizen was prohibited from obtaining soap, candles or carriages from any other than the particular corporation, how would the case stand? Could such company wantonly refuse to sell to the citizen upon the usual terms?

However, if these reasons are insufficient to distinguish the character of this corporation, we proceed to examine another already in part considered, which to our mind is conclusive; viz: the exclusive privilege conferred upon the company to manufacture and furnish or sell the gas.

The very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by the citizens thereof, would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonable terms. And when the nature and objects of the corporation are considered, viz: the exclusive right to manufacture and sell gas, for the purpose of lighting the city of Milwaukee, and the dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity. The very term is incompatible with the idea of trade and commerce. * * * If a company were chartered with the exclusive privilege of manufacturing and selling bread in the city of Milwaukee, would it be contended that the company were under no obligation to supply or sell bread to any but such person or persons as the company should capriciously select? Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence. * * *

We think there can be no doubt, that the company were bound to furnish the gas to the plaintiff, upon his complying with such reasonable conditions or terms as they might rightfully impose. (The court examined and found certain regulations unreasonable. S. C., 11 Wis. 234; 15 Wis. 318.)

Affirmed.[1]

MUNN v. ILLINOIS. 94 U. S. 113.

(1876)

Error to the Supreme Court of the State of Illinois.

The Constitution of Illinois, adopted in 1870, contains the fol-

[1] Electric light.—Clinton Electric L. H. and P. Co. v. Snell, 95 Ill. App. 552 (1900).

Fuel gas.—People ex rel. City of Los Angeles v. Los Angeles I. Gas Co., 150 Cal. 557.

Power of city to regulate prices. 9 Harv. L. Rev. 286.

Regulation of prices after franchise given. 10 Harv. L. Rev. 128; 16 Harv. L. Rev. 1-21, 436; 20 Harv. L. Rev. 69; 21 Harv. L. Rev. 56.

lowing in reference to the inspection of grain, and the storage thereof in public warehouses:—

"Article XIII—Warehouses.

"Section 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

"Sect. 7. The general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce."

The provisions of the act of the general assembly of Illinois, so far as the same have any direct bearing upon the questions involved in this case, are as follows:—

"Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that public warehouses, as defined in art. 14 of the Constitution of this State, shall be divided into three classes, to be designated as classes A, B, and C, respectively.

"Sect. 2. Public warehouses of class A shall embrace all warehouses, elevators, or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouses, elevators, or granaries, being located in cities having not less than one hundred thousand inhabitants.

"Sect. 3. The proprietor, lessee, or manager of any public warehouse of class A shall be required, before transacting any business in such warehouse, to procure from the Circuit Court of the county a license.

"Sect. 4. The person receiving a license as herein provided shall file, with the clerk of the court granting the same, a bond to the people of the State of Illinois, with good and sufficient surety, to be approved by said court, in the penal sum of $10,000, conditioned for the faithful performance of his duty as a public warehouseman of class A, and the full and unreserved compliance with all laws of this State in relation thereto.

"Sect. 5. Any person who shall transact the business of a public warehouse of class A without first procuring a license as herein provided. * * *

"Sect. 15. Every warehouseman of public warehouses of class A shall be required, during the first week of January of each year, to publish in one or more of the newspapers (daily, if there be such) published in the city in which such warehouse is situated, a table or schedule of rates for the storage of grain in the warehouse during the ensuing year, which rates shall not be increased (except as provided for in sect. 16 of this act) during the year; and such published rates, or any published reduction of them, shall apply to all grain received into such warehouse from any person or source; and no discrimination shall be made, directly or indirectly, for or against any charges made by such warehouseman for the storage of grain.

"The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one per cent per bushel."

On the twenty-ninth of June, 1872, an information was filed in the Criminal Court of Cook County, Ill., against Munn & Scott, alleging that they were, on the twenty-eighth day of June, 1872, in the city of Chicago, in said county, the managers and lessees of a public warehouse, known as the "North-western Elevator," in which they then and there stored grain in bulk, and mixed the grain of different owners together in said warehouse; that the warehouse was located in the city of Chicago, which contained more than one hundred thousand inhabitants; that they unlawfully transacted the business of public warehousemen, as aforesaid, without procuring a license from the Circuit Court of said county, permitting them to transact business as public warehousemen, under the laws of the State.

To this information a plea of not guilty was interposed.

From an agreed statement of acts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the

ground occupied by the "North-western Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The North-western Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the Circuit Court of Cook County, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the Circuit Court a bond to the people of the State of Illinois, as required by sects. 3 and 4 of the act of April 25, 1871. The city of Chicago then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said act, except in two particulars: first, they had not taken out a license, nor given a bond, as required by sects. 3 and 4; and, second, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by sect. 15.

The defendants were found guilty, and fined $100.

The judgment of the Criminal Court of Cook County having been affirmed by the Supreme Court of the State, Munn & Scott sued out this writ, and assign for error:—

1. Sects. 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of sect. 8 of art. 1, and the sixth clause of sect. 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.

Mr. CHIEF JUSTICE WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States."

2. To that part of sect. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive" as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservation by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. & B. Railroad Co., 27 Vt. 143; but it does authorize the estab-

lishment of laws requiring each citizen to so conduct himself and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, sic utere tuo ut alienum non lædas. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be juris privati only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise De Jure Maris, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for

the purpose of lighting the city of Milwaukee, and the places of business and residences of the inhabitants of said city, according to the terms of a contract entered into originally between John Lockwood and said city, and in conformity with the duties and obligations resulting from the act of its incorporation.

The plaintiff was a merchant doing business on East Water street, in said city, along which the gas pipes of the company were laid, and had fitted up his store with the necessary pipes, tubes, burners, and apparatus for lighting it with gas. He then applied to the company to furnish him with gas, and tendered five dollars in advance payment therefor. The company, before they would furnish the gas, required the plaintiff to sign what purported to be an agreement, and was, at least, a promise to take gas according to the terms and conditions contained in the printed rules and regulations of the company, which were introduced in evidence. This the plaintiff refused to sign, and for that reason, and none other, the company refused to furnish him with gas. The plaintiff then brought his action to recover damages of the said company for such refusal in a justice's court, claiming damages to the amount of $100, where the defendant obtained judgment, and the plaintiff appealed. The county court reversed the judgment of the justice, and gave judgment for the amount claimed and costs. The defendant now brings the case here by appeal to be reviewed. * * *

The question is, whether the citizen, willing to submit and conform to all such regulations as the company might rightfully impose, was entitled to demand of and be supplied with gas by the company? In other words, was not the company bound to sell their gas at the usual rates to all and every citizen of Milwaukee who was prepared by pipes and the necessary fixtures for its consumption and use, upon compliance with such conditions and regulations as the company might rightfully impose?

In considering this question it is not deemed necessary to examine critically the contract of Lockwood with the city, or the charter of the gas company in detail. It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that, hence, the only

means of supply available to the citizens was through the agency of the company. It is within the everyday experience of us all, and, hence, within the judicial knowledge of the court, that the manufacture and supply of inflammable gas for the purpose of lighting cities, stores and dwellings, is not a domestic or family manufacture. It is carried on either by public or associated capital, and is dependent for its profit upon general consumption. Corporations of this kind are not like trading or manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world. Their product is designed for the consumption of the immediate community in which the manufacture is wrought. It is not a trading corporation, for its product depends exclusively upon home consumption. If gas were an article of merchandise, and could be bottled or packed up, and imported or exported like soap, candles or hats, to be distributed to the various markets of commerce, there might possibly be claimed for it the character of merchandise, or manufactures partaking of that attribute. But such is not the fact. * * *

But it is asked, would a soap and candle factory, or a hat or carriage factory, with the privilege of laying pipes in the public streets, make it a public corporation, and oblige the company to furnish soap, candles or carriages to any citizen upon tender of a fair compensation? Perhaps not. The citizen could procure his soap, candles and carriages elsewhere. These are all articles of trade, capable of transportation from place to place, and, as is sometimes alleged, the incorporation of companies for their manufacture, does not interfere with the rights or privileges of private citizens. But suppose the citizen was prohibited from obtaining soap, candles or carriages from any other than the particular corporation, how would the case stand? Could such company wantonly refuse to sell to the citizen upon the usual terms?

However, if these reasons are insufficient to distinguish the character of this corporation, we proceed to examine another already in part considered, which to our mind is conclusive; viz: the exclusive privilege conferred upon the company to manufacture and furnish or sell the gas.

unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be juris privati only; and, in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge,—

"In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow. (N. Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate," but the court said, "there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; * * * and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile v. Yuille, 3 Ala. n. s. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as

the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. * * * Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. * * * The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. * * * In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of

Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the seashore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. * * * They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-

coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he * * * take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be juris privati only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially.

But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.[1]

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other

[1] Reasonableness of rates, a judicial function.
Chicago, etc., Ry. v. Minnesota, 134 U. S. 418 (1889). Reagan v. Farmers, etc., Co., 154 U. S. 362 (1894).

place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that "it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case

we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

Judgment affirmed.

Mr. JUSTICE FIELD and Mr. JUSTICE STRONG dissented.

WEYMOUTH v. PENOBSCOT LOG DRIVING CO.,

71 Me. 29.

(1880)

An action on the case to recover damages of the defendant corporation for carelessly and negligently preventing the plaintiffs from seasonably delivering 751,290 feet of spruce logs, and 48,780 feet of pine logs, cut and hauled by them in the winter of 1872-3, on landings on the stream between Caribou Lake, and Chesuncook lake, at the outlet of Chesuncook lake, in consequence of which 600,000 feet of the plaintiff's logs were not driven to market in the year 1873, but were left behind in an exposed position, where many were lost, and there was a great shrinkage in quantity and quality.

Plea, general issue.

The verdict was for plaintiff for $1496.51, and the defendants move to set the same aside, as against law, and against evidence and the weight of evidence. The defendants also allege exceptions to refusals of the presiding judge to give certain requested instructions.

DANFORTH, J. It is contended that this action is not maintainable, and the court was requested to instruct the jury that, "The corporation is not by their charter under any legal obligation to drive the logs; but the charter gives them the power to drive, and for all such logs as they do drive, the corporation is to be paid."

It is claimed that this instruction is required by a fair construction of the terms of the charter. * * *

The first ground taken in support of the request, is that the defendant company is a "mutual association combined together

for mutual benefit to aid each other in the accomplishment of a given object in which all are equally interested," and the inference drawn is, that each is equally responsible for the doings of all. This view is endeavored to be sustained by the alleged facts that "it is not a stock company, has no capital, no power to do anything for others than its own members, no permanent stockholders, no stock, and no provision for raising money to pay any charges or expenses except the expenses of driving."

If these suggestions are found to be apparent from the provisions of the charter, they, or a portion of them, will be entitled to great weight, and might perhaps be considered conclusive. The most important of them are not so found. It may be that the charter was obtained for the mutual benefit of the log owners. Nevertheless, by its express terms it constitutes its members a corporation with all the rights, liabilities and individuality attached to corporations of a similar nature. The first section provides that certain persons named, with their associates and successors, "are hereby made and constituted a body politic and corporate," and as such it may sue and be sued, prosecute and defend, may hold real and personal estate, not exceeding fifty thousand dollars at any one time, and may grant and vote money. Thus the charter gives all the attributes of a corporation and none of a simple association. It may not have stock, and if not, it can have no stockholders. But that is not necessary to a corporation and does not constitute an element in any approved definition of it. If it has no stock, it may have a capital, and though it may assess only a certain amount upon the logs driven, the charter does not preclude money from being raised in other ways. Nor is the amount which may be assessed upon the logs driven, limited to the expense of driving. The amendment of 1865 provides for a toll, not exceeding a certain amount, upon the logs driven "sufficient to cover all expenses, and such other sums as may be necessary for the purposes of the company."

Nor do we find any provision "that it may not do anything for others than its own members." By the charter it may drive all the logs and other timber to be driven down the west branch of the Penobscot river, while all owners of such logs may not be members of the company. It does not appear whether the first corporators were such owners or otherwise. In the charter we

find no provision prescribing the qualifications of the members. The by-laws provide, not that the member shall be an owner of logs to be driven, but he must be an "owner of timber lands or engaged in a particular lumbering operation on the west branch of the Penobscot river, or its tributaries," and can then be a member only on application and receiving a majority of the votes of the members present. Hence the company may be acting for others, not members, while its members may not own a single log in the drive.

There is then no ground upon which this defendant can be held to be a mutual association, acting as a partnership for the benefit of its own members only, each bound by the acts of the others, but it must be held as a corporation acting as such, for the benefit of its own members, perhaps, but also for such other owners of logs as may not choose to become members, or may not possess the required qualifications of "being a land owner, or a practical operator," or may not be able to get the requisite number of votes to make them such. It is a significant fact that in this case it does not appear that the plaintiff is a member of the defendant company, and until that does appear he cannot be subjected to the liabilities of one.

The fact that there is no specific provision for raising money to meet such a liability, as is here claimed, is immaterial. It cannot affect the plaintiff's right to a judgment. The liability of the log owners to be assessed, and its limits, are fixed by law, as also the purposes to which such assessments may be applied. Any recovery against the defendant will not change that law in the slightest degree. No assessment hereafter made can be increased to meet any contingency not contemplated by the charter, and if the plaintiff, after having obtained judgment, is unable to find means wherewith to satisfy it in accordance with the law, he will simply be in the condition of many other judgment creditors before him who have paid largely for that which affords them no benefit.

It is further contended that the action cannot be maintained, because, while the defendant under its charter has the right to drive all the logs to be driven, the obligations to do so is not imposed upon it. In other words, by the provision of the charter, it is left optional with the company to drive such as it may choose to do.

The language is, "and said company may drive all logs and other timber that may be in the west branch of the Penobscot river," &c., and it is contended that the word "may" must be construed as permissive and not as imperative. If any argument were needed to show that such is its proper construction, it would seem that the able and exhaustive discussion of this point by the counsel, would leave no room for doubt. The charter was granted as a privilege and not for the purpose of imposing an obligation, and when granted it has no binding effect until accepted by those for whom it was intended. But when accepted it becomes of binding force and must be taken with all its conditions and burdens, as well as its privileges. It cannot be accepted in part, and must be taken as a whole.

In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but "all" the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. If this exclusion was beyond the power of the legislature, it is not for this defendant to complain, for the right has been given to and accepted by it. By its acceptance and exclusion of the owner from the privilege, in justice and in law it is assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive all the logs, and that acceptance was an undertaking to drive them all, or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do.

R. S., c. 42, § 6, referred to by the defendant's counsel, is certainly a very good illustration of the law applicable to this case. There the person whose logs become so intermixed with those of another, as not conveniently to be separated for the purpose of being floated to the market, "may drive all the timber with which his own is so intermixed," and "shall be entitled to a reasonable compensation therefor." This clearly is a privilege conferred, a permission given and not an obligation imposed. Hence it is optional with the owner, whether to drive the logs so intermixed or otherwise. But having elected to drive them, he,

as the defendant in the case at bar, becomes a bailee for him, and is clearly subject to such care and skill as legally attached to such a position. True the defendant does not become the bailee unless the logs were seasonably delivered, as requested by the amended charter, and hence the principal question tried by the jury was, whether they were so delivered. Upon such delivery, the defendant in this case, as the owner in the case referred to, becomes liable to the duties of bailee, not by virtue of the statute alone, but by the assumption of rights conferred. * * *

3. This request is substantially, that if those having charge of the drive, acted with integrity and good faith in what they did in making the drive, and in concluding upon the time of starting, the company would not be liable to the plaintiff.

This is undoubtedly correct as far as it goes. It correctly contemplates that in making the drive, the defendant acted as an agent for the log owners. As the corporation must necessarily do its work through agents, it would be responsible for such agents. Integrity and good faith are indispensable requisites for an agent, but skill and diligence are equally so. The testimony in this case shows that a considerable amount of skill, as well as experience, was necessary to a successful drive where these logs were to be driven. This skill and experience, it appears, were equally necessary in determining when to start, as in managing the drive after it was started. The skill required according to the authorities cited by the counsel, is reasonable skill, "which is such as is ordinarily possessed, and exercised by persons of common capacity, engaged in the same business or employment; and ordinary diligence, which is that degree of diligence, which persons of common prudence are accustomed to use about their own affairs." Mechanics v. Merchants Bank, 6 Met. 26. Both these elements were ignored in the request and supplied, so far as necessary, by the instructions. The defendant, therefore, has no cause of complaint. * * *

Motions and exceptions overruled.

THE PEOPLE OF THE STATE OF NEW YORK v. BUDD, 117 N. Y. 1; 22 N. E. 670.

(1889)

Appeal from the judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made

December 31, 1888, which affirmed a judgment of a criminal term of said court, entered upon a verdict, convicting defendant of a misdemeanor, in violating the provisions of the act (Chap. 581, Laws of 1888) known as the Elevator Act.

ANDREWS, J. The main question upon this record is, whether the legislation fixing the maximum charge for elevating grain, contained in the act, chapter 581 of the Laws of 1888, is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state, at five-eighths of one cent a bushel, and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators, "lake vessels or propellers, the ocean vessels or steamships, and canal boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than one hundred and thirty thousand population. The defendant, the manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company for elevating, raising and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and for shoveling to the leg of the elevator, the carrier was charged and compelled to pay four dollars for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator one dollar and seventy-five cents a thousand bushels, for the use of the steam shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services and the expense of the steam-shovel charge the carrier for each thousand bushels of grain shoveled the sum of four dollars. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count charging a violation of the first section in two particulars, viz.: In exacting more that the statute rate for elevating the cargo, and exacting more than the actual cost for shoveling the grain

to the leg of the elevator. Before reaching the main question there is a subordinate question to be considered.

The defendant on the trial raised the question of the constitutionality of the act of 1888, and also insisted that, as to the alleged overcharge for shoveling, the facts did not show that the defendant had received anything for that service or that the cargo had been charged more than the actual cost, and excepted to the submission to the jury of that branch of the case. The trial judge overruled both points and submitted the case to the jury in both aspects, who found a general verdict of guilty, and thereupon the court imposed upon the defendant a fine of $250. It is now urged that, assuming the constitutionality of the act of 1888, the judgment should be reversed for the reason that no overcharge by the defendant for shoveling was proved, and also that the sum paid for shoveling was paid to the Shovelers' Union, the defendant only receiving thereout, from the union, the rent agreed for the use of the steam-shovel. There are two answers to this proposition. The words "actual cost," used in the statute, were manifestly intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. The purpose of the act could be easily evaded and defeated if the elevator owners were permitted to separate the services, and charge for the use of the steam-shovel any sum which might be agreed upon between themselves and the Shovelers' Union, and thereby, under color of charging for the use of the steam-shovel, exact of the carrier a sum for elevating beyond the rate fixed by the act. The second answer to the proposition is this: It was undisputed that the defendant exacted a greater charge for elevating than the sum allowed by the act. This was proven by testimony on the part of the prosecution and the defendant. The verdict of guilty was followed by the infliction of the lowest penalty for a single offense. The verdict and sentence were justified without considering whether an offense was made out under the second allegation in the indictment. No questions as to the form of the indictment was made. The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of a judgment where there is a

general verdict and the sentence is single and is appropriate to either of the counts upon which the conviction was had. (Polinsky v. People, 73 N. Y. 65.) Even if the alleged overcharge for shoveling was not made out, the verdict and sentence are supported by the findings of the jury on the other branch of the case, and the refusal of the judge to withdraw from the jury the consideration of the question, whether there was an overcharge for shoveling, did not prejudice the defendant.

Passing this point, we come to the main question, whether legislative power under the state Constitution exists in the legislature to prescribe a maximum charge for elevating grain by stationary elevators owned by individuals or corporations, who have appropriated their property to this use and are engaged in this business. The ascertainment of the exact boundaries of legislative power under the rigid constitutional systems of the American states is in many cases attended with great perplexity and difficulty. The People have placed in the Constitution a variety of restrictions upon legislative powers, and chief among them is that which ordains that no person shall be deprived of life, liberty or property without due process of law. There is but little difficulty in determining the validity of a statute under this constitutional principle in cases where the statute assumes to divest the owner of property of his title and possession, or to actually deprive him of his personal liberty. The state may lawfully take the property or life of the citizen without infringement of the constitutional guaranty. The cases where the right of property is set aside by positive laws are various. Distress, executions, forfeitures, taxes, are of this description, "wherein," said Lord Camden in Entick v. Carrington (19 How. St. Tr. 1066), "every man by common consent gives up that right for the sake of justice and the common good." The state may directly take private property for public use on the condition of making compensation, and the cases where it may be taken in satisfaction of public and private obligations or for the support of government, or as a return for governmental protection, are determined by general rules, well understood and easily applied. The difficulty in the application of the constitutional principle arises in the main in respect to that class of legislation, not infrequent, which, while it does not, in a strict sense, deprive an individual of his property or liberty, does, nevertheless, in many cases, by

the imposition of burdens and restrictions upon the use and enjoyment of property and by restraints put upon personal conduct, seriously impair the value of property and abridge freedom of action. The validity of legislation of this kind, to some extent, and within certain limits, is questioned by none. But such legislation may overpass the boundaries of legislative power and violate the constitutional guaranty, for it is now an established principle that this guaranty protects property and liberty, not merely from confiscation or destruction by legislative edicts, but also from essential impairment or abridgment not justified by the principles of free government. This court has recently, in several notable instances, vindicated the rights of individuals against unjust and oppressive legislation, restraining freedom of action or imposing conditions upon private business, not warranted by the Constitution. (In re Jacobs, 98 N. Y. 98; People v. Mars, 99 id. 377; People v. Gillson, 109 id. 399.) But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all. This power of government, the power as expressed by Taney, Ch. J. (5 How. 583), "inherent in every sovereignty, the power to govern men and things," is not, however, an uncontrollable or despotic authority, subject to no limitation, exercisable with or without reason in the discretion or at the whim or caprice of the legislative body. But within its legitimate domain the power is original, absolute and indefeasible. It vested in the legislative department of the government at its creation, without affirmative grant or definition, as an essential political power and attributive of government, and personal rights and rights of property are subordinate to this supreme power acting within its appropriate sphere. It may be exercised so as to impair the value of property or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control

of the laws. It was designed for the protection of personal and private rights against encroachments by the legislative body not sanctioned by the principles of civil liberty as held and understood when the Constitution was adopted. The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. The power of the British parliament is not the test of legislative power under the written Constitution of the American States. But the great landmarks of civil liberty, embodied in our State Constitution, were established by our English ancestors, and upon questions such as the one now before us we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, the practice of legislation and legal adjudications are pertinent and important considerations and elements in the determination of the controversy.

The act in question regulates the price of elevating grain, and the regulation affects the compensation which may be lawfully demanded for labor and personal services, as well as for the use of property. It fixes a maximum charge for labor and the use of property when combined, as they of necessity are, in the business of elevating grain. The operation of the statute is by its terms limited to the business carried on in cities and towns having a population of not less than one hundred and thirty thousand, practically to the cities of Buffalo, New York and Brooklyn. The circumstances, also, substantially restrict the application of the act to grain brought to Buffalo from the upper lakes by water, and there, by means of elevators, transhipped into canal boats and transported through the Erie canal and Hudson river to the harbor of New York and there discharged by elevators into warehouses or ocean vessels. The business of transporting grain by the lakes, and thence by the Erie canal to New York, is one of great magnitude. The case shows that about one hundred and twenty millions of bushels of grain annually come to Buffalo from the west. The business of elevating grain at that

point is mainly connected with lake and canal transportation. It is shown by official records that the receipts of grain at New York in the year 1887, by way of the Erie canal and Hudson river, during the season of canal navigation, exceeded forty-six million bushels, an amount very largely in excess of the amount received during the same period by rail and by river and coastwise vessels. The elevation of this grain from lake vessels to canal boats takes place at Buffalo, where the case shows there are thirty or forty elevators, stationary and floating. How many of these elevators are actually employed in the business does not appear. The record is silent as to many facts which might tend to explain the relation of this business as actually conducted, to the public interests. It is asserted that a combination exists, and has for several years existed, between the elevator owners to maintain excessive charges, by fixing a uniform tariff and pooling the earnings, and dividing them ratably among all the elevator owners, although but a part of the elevators are actually operated. (See report on foreign commerce of the Chamber of Commerce of New York, made in April, 1885.) There is no evidence in the record as to the locations in the port of Buffalo suitable and available for stationary elevators. It is evident that they must be placed where they can be reached by both lake vessels and canal boats, and it may reasonably be assumed that but a limited area (not devoted to other purposes of commerce) is available for the erection of stationary elevators.

The case of Munn v. Illinois (94 U. S. 113) is a direct authority upon the question now before us. That case was brought to the United States Supreme Court on a writ of error, to review a judgment of the Supreme Court of the State of Illinois, which affirmed the constitutionality of a statute of that state fixing a maximum charge for the elevation and storage of grain in warehouses in that state. The act was challenged as a violation of the constitutional guaranty in the Constitution of Illinois, protecting life, liberty and property expressed in substantially the same language as in the Constitution of this state. The Supreme Court of the United States affirmed the judgment of the state court on the ground that the legislation in question was a lawful exercise of legislative power, and did not infringe the clause in the fourteenth amendment of the Constitution of the United States, "nor shall any state deprive any

person of life, liberty or property, without due process of law." The legislation in question in Munn v. Illinois was similar to, and is not distinguishable in principle from the act (Chap. 581, Laws of 1888) now under review. The question in that case was raised by an individual owning an elevator and warehouse in Chicago, which had been erected for, and in connection with which he had carried on the business of elevating and storing grain for many years prior to the passage of the act in question, and prior, also, to the adoption of the amendment of the Constitution of Illinois in 1870, declaring all elevators and warehouses where grain or other property is stored for a compensation to be public warehouses. The case of Munn v. Illinois has been referred to by this court in several cases. (People ex rel. v. B. & A. R. R. Co., 70 N. Y. 569; Bertholf v. O'Reilly, 74 id. 509; B. E. S. R. R. Co., v. B. S. R. R. Co., 111 id. 132; People v. King, 110 id. 418.) * * * In People v. King the doctrine of the Munn case was applied by this court to uphold the validity of a statute which prohibited the exclusion of any citizen from theatres or other places of amusement, by reason of race, color or previous condition of servitude, and a conviction in that case was sustained, where the defendant, the proprietor of a skating-rink, erected on his own property, opened it to the public, but excluded therefrom, on the occasion of a public entertainment, on the ground of race and color, a colored person who sought admission. The court is not concluded by these cases, or any of them, from re-examining the principle on which the decision in Munn v. Illinois proceeded, but we cannot overrule and disregard that case without, as I think, subverting the principle of our decision in the King case, and certainly not without disregarding many deliberate expressions of this court in approval of the principle of that decision. * * *

Prior to the adoption of the fourteenth amendment personal rights and rights of property were, as a rule, exclusively matters of state cognizance, and the state courts were the ultimate tribunals for the determination of questions arising under the constitutional guaranty of life, liberty and property, which was found only in the state Constitutions. Their decisions were not subject to review in the courts of the United States. (Slaughter-house Cases, 16 Wall. 36.) There were exceptions growing out of article 1, section 10 of the Federal Constitution,

that "no state should pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," not material here. Since the fourteenth amendment, the question whether a state statute infringes the constitutional guaranty protecting life, liberty and property, where it arises in a state court, involves the consideration of both the Federal and State Constitutions, although the ground of construction and decision is identical under either instrument. But whether the decision of the state court presents a federal question reviewable on appeal to the Supreme Court of the United States, depends on the nature of the decision of the state court; that is to say, whether it affirmed the validity of the statute, or held it to be unconstitutional and void. If the state court decides that the statute does violate the constitutional guaranty, its decision is now, as before the fourteenth amendment, final and conclusive, and no appeal can be taken to the federal court, as in that case no right under the Constitution and laws of the United States has been denied. If, on the other hand, the state court sustains the statute and denies the right asserted, the federal jurisdiction attaches, and an appeal may be taken to the United States Supreme Court. * * *

The power of the legislature to regulate the charge for elevating grain, where the business is carried on by individuals upon their own premises, depends upon the question whether the regulation falls within the scope of what is called the police power, which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, necessary for the public welfare. The existence of this power is universally recognized. All property, all business, every private interest may be affected by it and be brought within its influence. Under this power the legislature regulates the uses of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relations to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interests of society. It has limitations; it cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes bur-

dens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interest or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of the terms employed by jurists and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity and duty, as each case is presented, to determine whether the particular statute falls within or outside of its appropriate limits. "It is much easier," said Chief Justice Shaw, in Comm. v. Alger (7 Cush., 53), "to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise."

In determining whether the legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations which, however common in rude and irregular times are inconsistent with constitutional liberty.

The justification of the statute of Illinois regulating the charge for elevating and storing grain in the elevators of that state was placed in the Munn Case upon that principle of the common law stated by Lord Hale in his treatise De Portibus Maris (1 Harg. Law Tracts, 78), that when private property is "affected by a public interest it ceases to be juris privati only." The principle of the decision is stated with great perspicuity by Bradley, J., in his opinion in the Sinking Fund Cases (supra.) He says: "The inquiry there was as to the extent of the police power where the public interest is affected; and we held that where an employment becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." The elevators in Chicago had no legal monopoly in the business of elevating grain. The business was open to all comers, but the location of the elevators, their connection with the railroads, on which most of the grain from the grain-producing states and territories of the west and north-west was brought to Chicago, the necessity of using them in the transfer, storing and transhipment of grain, created, as was held by the court, a virtual and practical monopoly which affected the business and property with a public interest and subjected them to regulation by law. But the question is whether the power of the legislature to regulate charges for the uses of property and the rendition of services connected with it, depends in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection from the government, or some peculiar benefit in the prosecution of his business. Lord Hale in the treatises De Portibus Maris and De Jure Maris, so largely quoted from in the opinions in the Munn Case, used the language that when private property is "affected with a public interest, it ceases to be juris privati only," in assigning the reason why ferries and public wharves should be under public regulation and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing-places on both

sides of the stream, without a charter from the king or a prescription, time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative, it will be seen that it was vested in the king as a means by which a business, in which the whole community were interested, could be regulated. In other words, it was simply one mode of exercising a prerogative of government, that is to say, through the sovereign instead of through parliament, in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. * * * The contention that the right to regulate the charges of ferrymen or wharfingers was founded on the fact that tolls could not be taken without the king's license, does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he, by express license, authorize the taking of more. The language of Lord Hale, that private property may be affected by a public interest, cannot justly, we think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign.

The control which, by common law and by statute, is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property, does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of reasonable compensation. From time to time statutes have been enacted in England and in this country, fixing the sum which should be charged by carriers for the

transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers, until recent times, was conducted almost exclusively by individuals for private emolument, and was open to everyone who chose to engage in it. The state conferred no franchise and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers and the subjection of the business to public regulations were based on the character of the business, or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment." (Jones on Bailments, Appendix.) It is only a public employment in the sense of the language of Lord Hale, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law that common carriers must serve the public for a reasonable compensation became a part of the law of this State, and from the adoption of the Constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn Case, which was cited with approval on this point in Sawyer v. Davis (136 Mass. 239). It accords with the language of Chief Justice Shaw in Comm. v. Alger (supra): "Whenever there is a general right on the part of the public, and a general duty of the landowner, or any other person to respect such right, we think it is competent for the legislature by a specific enactment to prescribe a precise, practical rule for declaring, establishing and securing such right and enforcing respect for it." The practice of the legislature in this and other states to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is reserved by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legis-

lature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter the legislature may, nevertheless, interfere and prescribe or limit the charges of railroad corporations. (Granger Cases, supra; Dow v. Beidelman, 125 U. S. 680; Earl, J., in People ex rel. v. B. & A. R. R. Co., supra; Ruger, Ch. J., in B. E. S. R. R. Co. v. B. St. R. R. Co., supra.) The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state in constituting a corporation may prescribe or limit its powers and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchises are the duties and obligations imposed by the act of incorporation. But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of services connected with such use, unless there is a legal monopoly, or special governmental privileges or protection has been bestowed.

It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to

the details of personal conduct and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which, by legislation, would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty—liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie canal and Hudson river to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transpor-

tation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The state of New York, in the construction of the Erie canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The legislature of the state, in entering upon the work of constructing a waterway between Lake Erie and the Atlantic ocean, set forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures and commerce, mitigate the calamities of war and enhance the blessings of peace, consolidate the Union and advance the prosperity and elevate the character of the United States." In the construction and enlargement of the canal the state has expended vast sums of money raised by taxation, and, finally, to still further promote the interests of commerce, it has made the canal a free highway, and maintains it by a direct tax upon the people of the state. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the state, promoted the prosperity of the people, and to it more, perhaps, than to any other single cause, is it owing that the city of New York has become the commercial metropolis of the Union. Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of transportation which shall enhance the cost of the necessaries of life or force the trade in grain into channels outside of our state. In Hooker v. Vandewater (4 Den. 349) the court was called upon to consider the validity of an agreement between certain transportation lines on the canals to keep up the price of freights. The court held the agreement to be illegal, and Jewett, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is

a matter of public concern and in which the public have a deep interest does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." The same question came up a second time in Stanton v. Allen (5 Den. 434) and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the state, constructed at great expense as facilities to trade and commerce and to foster and encourage agriculture, and are, at the same time, a magnificent source of revenue, whatever concerns their employment and usefulness deeply involves the interest of the whole state." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chitty on Prerogatives, 162); and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases allotted to the king by the Constitution, and many governmental powers vested in the sovereign in England have, since our Revolution, devolved on the legislatures of the states. The statutes of England in earlier times were full of oppressive commercial regulations, now, happily, in great part, abrogated; but that the interests of commerce are matters of public concern all states and governments have fully recognized. The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits, is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges and to bring into the combination any new elevator which may be erected and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination, in fact, exists, the principle of free competition in trade is excluded.

The precise object of the combination would be to prevent competition. The result of such a combination would neces-

sarily be to subject the lake vessels and canal boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists, the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said Chase, Ch. J., in the License Tax Cases (5 Wall. 469), "can know nothing of public policy, except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative act. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here."

Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord Hale, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen and interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges of hackmen springs from the fact that they are assigned stands in the public streets; that the legislature may regulate the toll on ferries, because the right to establish a ferry is a franchise, and, therefore, the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the bed of navigable streams, the title to which was in the sovereign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute, it was taken subject to regulation by law. The plain reason, we think, why

the charges of hackmen and ferrymen were made subject to public regulations is, that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the bed of navigable streams was frequently vested in a subject, and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between the wharves built upon the bed of navigable waters, the title to which was in the sovereign, and wharves erected upon navigable streams, the bed of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord Hale on the ground of a virtual as distinguished from a legal monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit conferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is, that the prohibition, as well as the regulation of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances, collectively, create an exceptional case and justify legislative regulation.

The case of Munn v. Illinois has been frequently cited with approval by courts in other states. (Nash v. Page, 80 Ky. 539; Hockett v. State, 105 Ind. 250; C. and P. Tel. Co. v. B. and O. Tel. Co., 66 Md. 399; Davis v. State, 68 Ala. 58.) In Nash v. Page it was held, upon the doctrine of the Munn Case, that warehousemen for the public sale and purchase of tobacco in Louisville, exercised a public business and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In Hackett v. State, it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were in legal contemplation devoted to public use. In Chesapeake, etc., Telephone Company v. Baltimore and Ohio Telegraph Company, legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn Case.

The criticism to which the Munn Case has been subjected has proceeded mainly on a limited and strict construction, and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the case of People v. King (110 N. Y. 418) it was given a much broader scope and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public entertainments. In that case the owner of the skating rink derived no special privilege or protection from the state. The public had no right in any legal sense to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment, he subjected it to public regulation. There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so

as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which has been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power and invested it with the prerogative of bringing every legislative act to the test of the Constitution. But no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which, sooner or later, is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberrations may have marked its course. So, also, in that wide range of legislative powers over persons and property, which lie outside of the prohibitions of the Constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy, if, at the bottom, the legislation under it is oppressive and unjust. The remedy, by taking away the power of the legislature to act at all, would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules, a

danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the legislature from correct principles of government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as a reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional, as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature.

The judgment should be affirmed.[1]

GRAY, J. (dissenting).

HAUGEN v. ALBINA LIGHT AND WATER CO., 21 Ore. 411; 28 Pac. 244.

(1891)

Defendant appeals.

This is an action for a writ of mandamus to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook street, and allowing him to connect a service-pipe therewith, etc. * * * The defendant is a corporation, the business of which, among other things, is to furnish the city of Albina, and the inhabitants thereof, with water. It is operating under a franchise granted to said company by the council of the said city of Albina. By virtue of the authority conferred by said ordinance, the defendant laid down a four-inch water-main in and through Tillamook street in the then city of Albina, from the east line of the original townsite of the city of Albina, to the west line of Twenty-fourth street in Irvington, and connected the said main with the main on Margaretta avenue in said city, and for nearly a year past has been pumping water and conducting it through said main on Tillamook street to supply the citizens of Irvington residing east of Fourteenth street. The defendant utterly refuses to allow persons residing

[1] 6 Harv. L. Rev. 44.

on Tillamook street between the east line of the original townsite of Albina and Fourteenth street in Irvington, to tap said main, and refuses to supply them with water therefrom. The plaintiff resided on Tillamook street between the points above named, and is the owner of lot 2, block 126, of Irvington.

Ellis G. Hughes and C. H. Prescott are owners of the tract of land known as Irvington and John Irving's First Addition, east of Fourteenth street in Albina, and in pursuance of an agreement entered into between the said Hughes and Prescott, for the purpose of supplying water to their property in Irvington and said John Irving's First Addition, the defendant laid down in said Tillamook street a supply pipe for said Hughes and Prescott, for which pipe the said Hughes and Prescott paid, for the sole purpose of supplying said lands with water; said pipe is owned by said Hughes and Prescott, and is under their absolute control; the defendant has no right to tap the same except with the consent of Hughes and Prescott without paying the said Hughes and Prescott the sum of thirty-six hundred dollars, the cost of laying the same.

LORD, J. From this statement of the case, as presented by the pleadings, the court below held that when the defendant entered upon, and laid down its water-mains in the street, in pursuance of privilege granted by the ordinance, it became bound to supply every abutter upon the street with water.

The contention for the defendant is, that the ordinance does not impose the duty upon it to furnish water, but only if it shall furnish water, that the charge thereof shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets, for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers, but that it contains no provision requiring it to supply the city or its inhabitants with water, hence the ordinance imposes no duty upon the company to furnish water to any one.

In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and its inhabitants with water, and that the city by its ordinance granted it the right to lay water-mains through its streets for the purpose of carrying into effect the objects of its incorporation, it insists that the ordi-

nance is the measure of the rights conferred and the obligation imposed, which, by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitants of the city with water."

Counsel say: "If the ordinance had imposed upon the company the duty of supplying the inhabitants with water as a part of the conditions of the grant, such a conclusion might be supported; but where no such duty is imposed, and nothing is said except that when the company furnishes water, it shall charge no more than a certain rate per month, they fail to see the soundness of the reasoning which makes it the duty of the company to furnish water."

It is thus seen that it is the absence of any express provision in the ordinance, imposing the duty upon the defendant to supply water, upon which the argument and the case for the defendant is predicated. The effect to be given to the fact that the defendant company was incorporated under the law to furnish water to the city and its inhabitants, and the implied obligation which the defendant assumed by accepting the grant or franchise under the ordinance, is entirely overlooked. The defendant is treated as a private corporation, the business of which is private and not of a public nature, and to meet a public necessity, and as a consequence, that it should not be subjected to duties or obligations that are not binding upon other private corporations. In support of this view, the only authority cited and relied upon by the defendant is Paterson Gas Light Co. v. Brady, 27 N. J. L. 245; 72 Am. Dec. 360.

In that case the court was urged to assert the doctrine that gas companies, like common carriers and innkeepers, were bound to accommodate the public, but refused on the ground that the lack of precedents upon the subject could only be based upon the strong presumption that there was no principle of law upon which such a view could be supported. The court says: "The company may organize, they may make and sell gas or not at their pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative than to hold that other

companies incorporated to carry on manufactories, or to do any other business, are bound to serve the public any further than they find it to be their interest to do so. It was earnestly insisted on the argument that the community has a great interest in the use of gas, and that the companies set up to furnish it ought to be treated like innkeepers and common carriers, and that if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a strong presumption that there is no principle of law upon which it can be supported."

But this case and its reasoning was directly disapproved and overruled in the subsequent case of Olmstead v. Proprietors of Morris Aqueduct, 47 N. J. L. 333, in which the court says: "In that case,—Paterson Gas Light Co. v. Brady,—Mr. Justice Elmer declared that the company was under no legal obligation to supply gas to all persons having buildings on the line of their pipes, upon tender of reasonable compensation. He rested this view on the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the legislature, in creating the company and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of pipes, and of course the grant of eminent domain for such private purposes would be void. In this respect, in my judgment, the conclusion in the Paterson case was erroneous, and in conflict with the views expressed in Tide Water Co. v. Coster, 3 C. E. Green, 518; 90 Am. Dec. 634, and in Nat. Docks Ry. Co. v. Cent. R. Co. 5 Stew. Eq. 755."

This view is certainly more in accord with recent decisions establishing the doctrine that it is mandatory upon corporations of this sort to supply one and all without distinction. The defendant by incorporating, under the statute for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of

eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise, belonging to the public and not enjoyed of common right, for the accomplishment of public objects and the promotion of the public convenience and comfort. Its business was not of a private, but of a public nature, and designed under the conditions of the grant as well for the benefit of the public as the company.

"Such a business," says Mr. Justice Harlan, "is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale, but as the distribution of gas in thickly populated districts is, for the reason stated in other cases, a matter of which the public may assume control, services rendered in supplying it for public and private use, constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question." (Louisville Gas Co. v. Citizens Gas Co. 115 U. S. 683.) And, in another case, the same eminent judge said: "The manufacture of gas and its distribution for public and private use, by means of pipes laid down, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government to be granted for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision." (New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650.)

It must then be conceded that the defendant is engaged in a business of a public and not of a private nature, like that of ordinary corporations engaged in the manufacture of articles for sale, and that the right to dig up the streets and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be grant-

ed by the state, or the municipality acting under legislative authority. In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose. Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipes therein for conducting or distributing water for public and private use. It was not organized to lay pipes but to supply water, and the grant was to enable it to do so and thereby effect the public purpose contemplated.

When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the street and lay pipes therein for conducting water, except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as Van Syckel, J., said, "is not a public purpose, it is difficult to conceive of any enterprise entrusted to a private corporation that could be classed under that head." (Olmstead v. Morris Aqueduct, supra.)

As the defendant could not carry on the business of supplying water without the franchise, the city must have intended, in granting such franchise, to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of the grant, must have assumed the performance of such duty. In a word, the acceptance of a franchise, under such conditions, carries with it the corresponding duty of supplying the public

without discrimination with the particular commodity which the corporation was organized to supply. "It may be laid down as a general rule," says Mr. Morawetz, "that whenever the aid of the government is granted to a private company, in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. * * * The same rule applies to companies invested with special privileges at the expense of the public for the purpose of supplying cities with water." (2 Morawetz on Corp. § 1129.)

The books are replete with illustrations of this principle as applied to water companies, gas companies, telephone companies, and others in the performance of public duties. In Lumbard v. Stearns, 4 Cush. 61, it was held that if an aqueduct corporation, established for the purpose of supplying a village with pure water, should undertake capriciously and oppressively to enhance the value of certain estates by furnishing them with a supply of water and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise. SHAW, C. J., said: "We can perceive no ground on which to sustain the argument that this act does not declare a public use. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged that there is no express provision therein requiring the corporations to supply all families and persons who should apply for water on reasonable terms; that they may act capriciously and oppressively, and that by furnishing some houses and lots and refusing to supply others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it." This case is cited with approval in Lowell v. Boston, 111 Mass. 464; 15 Am. Rep. 39, and in Olmstead v. Morris Aqueduct, supra, in which the Paterson Gas Light Co. v. Brady, 3 Dutch. 245; 722 Am. Dec. 360, is distinctly disapproved and overruled. In Shepard v. Milwaukee Gas Light Co. 6 Wis. 539; 70 Am. Dec. 479, the company had the exclusive right of supplying the city of Milwaukee with gas. The plaintiff, a merchant doing business on a street containing one

of the defendant's mains, fitted up his establishment with the necessary pipes and fixtures for lighting the same with gas. He then applied to the gas company for a supply, tendering at the same time five dollars in advance payment therefor. He was required as a condition precedent to sign the printed rules and regulations of the company. He declined to do so. The company refused to waive the point, and suit was brought to recover damages suffered by the plaintiff because of such refusal. After discussing the question at great length, the courts held that the company, upon compliance by the citizen with such reasonable terms as it may rightfully impose, was bound to furnish gas to the citizen who has made all necessary preparation to receive the same. But the court declares that the fact of an exclusive right to manufacture and sell gas in the city would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply upon reasonable terms; that when the nature and objects of the corporation are considered, namely, the exclusive right to manufacture and sell gas for the purpose of lighting the city and dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity?

In Williams v. M. G. Co. 52 Mich. 499; 50 Am. R. 266, the action was for damages for the failure of the defendant to furnish the plaintiff with gas, as plaintiff claimed was the defendant's duty. The court says: "The questions presented and argued before the judge of the superior court by counsel for the defendant were, first, the plaintiff could not recover for the reason that the defendant was under no legal obligation or duty to supply any citizen of Detroit with gas. * * * The court below disagreed with the defendant's counsel upon this point. I agree with the judge of the superior court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residence and places of business east of the center of Woodward avenue with gas, wherever the defendant has connected its mains and service-pipes with the pipes and fixtures used at such residences and places of business and the owners or occupants shall desire the same. The defendant is a corporation in the enjoyment of certain rights and privileges under the statutes of the state and charter and by-

laws of the city and derived therefrom. These rights and privileges were granted that the corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity, and the duty of this corporation imposed cannot, therefore, be likened to that of an innkeeper or common carrier, but more nearly approximates that of the telegraph-, telephone-, or mill-owner." (Price v. Riverside, etc. Co. 56 Cal. 431; McCrary v. Beaudry, 67 Cal. 120; Lloyd v. Gas Light Co. v. Mackay, 331; People v. Manhattan Gas Light Co. 45 Barb. 136; Gas L. Co. v. Colliday, 25 Md. 1; Gas L. Co. v. Paulding, 12 Rob. 378.)

The same principle applies to telephone companies, which are regarded so far common carriers in their relation to the public that they must serve all members thereof alike in the transmission of messages. In Cent. Tel. Co. v. State ex rel. etc. 118 Ind. 266; to Am. St. Rep. 114, the court says: "While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. * * * It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance, with whom they have important business, and converse without loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination? Any person or corporation engaged in the telephone business, operating telephone lines, furnishing telephonic connections, facilities and services to business houses, persons and companies,

and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company, discriminated against, to furnish to the petitioner a like service as furnished to others." (State v. Neb. Tel. Co. 17 Neb. 126; 52 Am. Rep. 404; Com. U. Tel. Co. v. N. E. Tel. & T. Co. 61 Vt. 241; 15 Am. St. Rep. 893; State v. Bell Tel. Co. 36 Ohio, 296; 38 Am. Rep. 583.)

A corporation, undertaking by its acceptance of a public franchise to perform a certain service, can be by mandamus compelled to perform that service. (People v. N. Y. etc. R. R. Co. 104 N. Y. 58; 58 Am. Rep. 484; Vincent v. Chicago, etc. R. R. Co. 49 Ill. 33; Farm. L. & T. Co. v. Henning, 17 Am. L. R. 266.)

The pipe which was laid by the defendant in Tillamook street was laid in pursuance of the franchise granted by the city, as it had no authority to lay any other kind of pipe or main than prescribed by the ordinance, or for any other purpose than conducting water to supply the city and its inhabitants without discrimination, to all persons having buildings or lots on the lines of their pipes, upon tender of the proper compensation. There is no claim that Hughes and Prescott had any right to dig up the street or to lay such pipe. It could only be done by the defendant so far as disclosed by this record, under the grant, in the mode prescribed, and for the purpose already stated. It is true, it is alleged in affect that the pipe was laid along the street and in front of the property of the plaintiff for the exclusive benefit of Hughes and Prescott's property, and for the sole purpose of supplying their lands with water. The street in front of the plaintiff's property was subjected to this public use for the special benefit of aiding in the sale of their property. Their object was to induce purchasers to buy land from them for homes in place of others whose property along the street abutted on the main. To favor them, the defendant, by virtue of the franchise granted, laid the pipe, but refused to supply the plaintiff with water from it, upon the tender of the amount usually charged for such service. As Hughes and Prescott are not parties to this record, what rights or contractual relations they may bear to the defendant we neither know nor decide. We attach no significance to the words supply pipe used in the answers. The pipe was laid along the street and in front of the lot of the plaintiff under the franchise granted by the city, and

by the terms of its incorporation, to supply water to the city and its inhabitants. This being a public purpose and the business of a public nature, the defendant must serve all alike, and for any discrimination, mandamus is the appropriate remedy.

We discover no error, and the judgment must be affirmed.[1]

BRASS v. NORTH DAKOTA EX REL. STOESER, 153 U. S. 391.

(1894)

Norman Brass, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the State of North Dakota. The defendant in error, Louis W. Stoeser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat. On September 30, 1891, Stoeser applied to store a part of his wheat-crop for the compensation fixed by section eleven of chapter 126 of the Laws of North Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. On this refusal Stoeser filed in the District Court of Ramsey County, North Dakota, a petition for an alternative writ of mandamus. The District Court granted an alternative writ of mandamus (as follows). * * *

SHIRAS, J. In the cases thus brought to this court from the States of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those States, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the eighth section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States, and to the Fourteenth Amendment, which ordains that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the cases now before us the same contentions are made, but we are not asked to review our decisions made in the previous

[1] Price v. Riverside, etc. Co., 56 Cal. 431; Water Works v. San Francisco, 82 Cal. 286.

cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of the facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire State.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire State, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the Statute of North Dakota would at once be validated if

one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities..

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern Cities; that the great elevators used in transhipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural State, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered, at some length, into a defense of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to justify to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of

the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere wth Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with the warehouse, is in storing his own grain, and that that storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own assumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of mandamus, based his defense wholly upon the grounds arising under the Constitution of the States and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations

amount to a regulation of commerce between the States. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly

Affirmed.

Mr. JUSTICE BREWER, with whom concurred Mr. JUSTICE FIELD, Mr. JUSTICE JACKSON, and Mr. JUSTICE WHITE, dissenting.[1]

GRIFFIN v. GOLDSBORO WATER CO., 112 N. C. 206.

(1898)

Civil action for an injunction, pending in Wayne Superior Court and heard before Timberlake, J., at Chambers on 19th April, 1898, on a motion to dissolve a restraining order thereto issued. His Honor continued the injunction to the hearing and defendant appealed.

CLARK, J. The defendent corporation is the owner of a plant which supplies water to Goldsboro and its inhabitants under a franchise granted by the city. It has no competition. The complaint alleges that to prevent competition the defendant reduced its rates largely to certain parties who threatened to establish a rival company, but not only did not make a corresponding reduction to the plaintiffs and other customers but proposes to put in meters whereby the rates to plaintiffs and others will be greatly increased, and threatens to cut off the water supply of the plaintiffs if they do not pay the increased rates, which will be to their great injury; that the rates charged by the corporation are not uniform and those charged the plaintiffs are unjust and unreasonable. The defendant denies, as a matter of fact, that the rates charged the plaintiffs are unreasonable and contends, as a proposition of law, that the company's rates are not required to be uniform and that it can discriminate in the rates it shall charge. It also relies upon the schedule of rates contained in the contract with the city and avers that the charges to the plaintiffs do not exceed the rates therein permitted.

[1] Cf. Calling v. Goddard, 183 U. S. 79; Stock Co. v. Exchange, 143 Ill. 239; Ladd v. Cotton Press, 53 Tex. 172. 8 Harv. L. Rev. 175.

The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets and otherwise to take benefit of the right of eminent domain. Besides, from the very nature of its functions it is "affected with a public use." In Munn v. Illinois, 94 U. S. 113, which was a case in regard to regulating the charges of grain elevators, it was held that, in England from time immemorial and in this country from its first colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and, where the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must to the extent of that interest submit to be controlled by the public.

Probably the most familiar instances with us are the public mills whose tolls are fixed by statute, and railroad, telegraph, and telephone companies, for the regulation of whose conduct and charges there is a State Commission, established by law. There have been reiterated decisions in the United States Supreme Court and in several States affirming the doctrine laid down in Munn v. Illinois, supra, and as to every class of interest affected with a public use, among others, water companies. Spring Valley v. Schottler, 110 U. S. 347. The right of fixing rates is a legislative function which the courts cannot exercise, but it is competent for the courts, certainly in the absence of legislative regulations, to protect the public against the exaction of oppressive and unreasonable charges and discrimination. "The franchise of laying pipes through the city streets and selling water to the inhabitants being in the nature of a public use, or a natural monopoly, the company cannot act capriciously or oppressively, but must supply water to all impartially and at reasonable rates, and an injunction will issue to prevent the cutting off the water supply where the customer offers to pay a reasonable rate and the company demands an unreasonable one." 2 Beach Pri. Corp., Section 834 (c); Munn v. Illinois, supra; Lumbard v. Stearns, 4 Cush. 60. In the 29 A. & E. Enc. 19, it is said: "The acceptance by a water company of its franchise carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same

service on equal terms and at uniform rates." If this were not so, and if corporations existing by the grant of public franchises and supplying the great conveniences and necessities of modern city life, as water, gas, electric light, street cars, and the like could charge any rates however unreasonable, and could at will favor certain individuals with low rates and charge others exorbitantly high or refuse service altogether, the business interests and the domestic comforts of every man would be at their mercy. They could kill the business of one and make alive that of another and instead of being a public agency created to promote the public comfort and welfare these corporations would be the masters of the city they were established to serve. A few wealthy men might combine and, by threatening to establish competition, procure very low rates which the company might recoup by raising the price to others not financially able to resist—the very class which most needs the protection of the law—and that very condition is averred in this complaint. The law will not and cannot tolerate discrimination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none, and if this is violated, or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other.

While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, those rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. Since the Constitution of 1868, Article VIII, Section 1, if the rates had been prescribed in a charter granted by the Legislature, they would be subject to revocation, and indeed independently of that constitutional provision, Stone v. Farmer's Co., 116 U. S. 307; R. Co. v. Miller, 132 U. S. 75; Chicago v. Munn, 134 U. S. 418; Georgia v. Smith, 70 Ga. 694; Winchester v. Croxton, 98 Ky. 739, still less can these rates bind consumers (if unreasonable or discriminating) since the town had authority to grant the franchise but not to stipulate for rates binding upon the citizens. The legislature did not confer that power. The rates are binding upon the company as a maximum simply because acting for itself it had the power to accept the franchise upon those conditions.

The allegations of fact that the rates are unreasonable and oppressive are denied. That they are not uniform is not denied and the defendant contended that it had the right to discriminate, Daily Inter-Ocean" and "The Weekly Inter-Ocean," which have which cannot be sustained. On the final hearing the cost and as the "Nebraska case"), U. S. Supreme Court, 1898. The evidences offered on that point on the hearing below is not satisfactory, the mere amount of mortgage bonds issued on the property being no reliable guide to the courts as to the true value of the investment. It may be, as sometimes happens, that value of the property will be material in determining as to the reasonableness of the rates charged. Smyth v. Ames (known the bonds and stocks are watered. Nor is the evidence of the cost of construction and operation conclusive, as has often been held, for it may be that the work was extravagantly constructed or is operated under inefficient management and the public are not called on to pay interest upon such expenditures, in the shape of unreasonable or extortionate rates. Missouri v. Smith, 60 Ark. 221; Chicago v. Wellman, 143 U. S. 339; Livingstone v. Sanford, 164 U. S. 578.

The court below properly continued the cause to the hearing. No error.

THE INTER-OCEAN PUB. CO. v. THE ASSOCIATED PRESS, 184 Ill. 438; 56 N. E. 822.

(1900)

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The Inter-Ocean Publishing Company, a corporation organized under the laws of the State of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as "The a wide circulation in the States and Territories of the United States. The Associated Press is a corporation organized under the laws of the State of Illinois in 1892. The object of its creation was, "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares and mer-

chandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Article II.—Sec. 8. Sale or purchase of specials.—No member shall furnish, or permit any one to furnish, its special or other news to, or shall receive news from any person, firm or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors." * * *

The Chicago Herald Company and the Chicago Daily News Company made complaint to the Associated Press that the Inter-Ocean Publishing Company was publishing news procured by it from the Sun Printing and Publishing Association of New York, the New York Sun of New York City and the Laffan News Bureau of New York City, and asked that the Inter-Ocean Publishing Company's contract and section 8 of article II of the by-laws should be enforced. The Associated Press gave notice to the Inter-Ocean Publishing Company that a meeting of its board of directors would be held at a time and place mentioned, to take action on the complaints of the Chicago Herald Company and the Chicago Daily News Company. Before the time set for hearing the Inter-Ocean Publishing Company filed its bill for an injunction against the Associated Press from suspending or expelling it from its membership and from refusing to furnish

it news according to the terms of its contract, and from doing any act or thing tending to deprive it of the news gathered by appellee, and for such other relief, general and special, as might be just and equitable.

The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and to preserve such monopoly had declared the Sun Printing and Publishing Association a rival or competitor in business and antagonistic to it, and sought to prohibit its members from buying news therefrom under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing and Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complaints against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing and Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing and Publishing Association of New York; that the right to receive the news gathered by appellee and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is absolutely needed in publishing its newspapers, from the Sun Printing and Publishing Association; that the appellee is attempting to force appellant to cease taking news from the latter association, but

to do so would work irreparable damages and injury to appellant, and would prevent it from furnishing needed, important and necessary news to the public, and would tend to create in favor of appellee a monopoly.

The appellee filed an answer to the bill. A hearing was had upon the bill and answer, both of which were sworn to, and certain affidavits which were read and used as depositions, and a decree was rendered dismissing the bill for want of equity. On appeal to the Appellate Court for the First District the decree was affirmed, and this appeal is prosecuted.

It has been uniformly held that a telegraph or telephone company is bound to treat all persons and corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. (People v. Western Union Tel. Co. 166 Ill. 15.) Where one is the owner of property which is devoted to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse and the public interest in such use may be of a widely variant character; but where the use is one in which the public is interested or has an interest, public control is necessary for the common good. (Munn v. People, 94 U. S. 113.) The appellee corporation voluntarily sought corporate existence to engage in an enterprise which invested it with, among others, the power of eminent domain. It was organized, among other things, to purchase, erect, lease, operate and sell telegraph and telephone lines,—a business which is essentially public in its nature and renders a corporation so engaged amenable to public control. Whilst, under the averments of the bill and answer and affidavits, the appellee corporation has only engaged in business to the extent of its power "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same," and has not attempted to purchase, erect, lease or sell telegraph and telephone lines, it is important to determine the

character of the corporation under its charter and under the business in which it is actually engaged.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them.

It was held in New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153 (on p. 163): "Assuming these market quotations and reports are property and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph company with the knowledge and consent of the board, as to become affected

with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them." This principle is sustained in Friedman v. Telegraph Co. 32 Hun. 4, and South v. Telegraph Co. 42 id. 354. The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news, for purposes of publication, which it was created to furnish.

It is urged, however, that by the terms of the contract appellant cannot retain its membership and stock in the Associated Press, and have the right to purchase news accumulated by it at contract price, without complying with that part of the contract which requires appellant to refrain from receiving news from any person or corporation which has been declared by the board of directors of appellee to be antagonistic to the latter, and without appellant being controlled or governed by the by-law of appellee to the same effect. The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge

of a public duty, or a private duty which has been so conducted that a public interest has attached thereto.

In Smith v. Telegraph Co. supra, an action was brought to restrain the defendant from removing from complainant's office a ticker, or from doing any act which would in any way interfere with the receipts of quotations from the stock exchange. By one of the clauses of the contract the plaintiff agreed that the company might forthwith discontinue its service without notice, whenever, in its judgment, any breach of the terms of the contract should be made by him. It was held: "But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations. What regulations are reasonable may not in all cases be easy to determine, but there need be no hesitation in saying that the clause of their contract permitting them to discontinue the service when, in their judgment, a breach of conditions has been had, is not a reasonable regulation and affords no defense to this action. No man can be judge in his own case, and to justify defendants in refusing to perform service there must be a reason that the court can pronounce sufficient."

In Commercial Union Tel. Co. v. New England Tel. Co. 61 Vt. 241, a question arose as to compelling a telephone company to furnish telephone service. In defense it was sought to set up a contract between the Bell Telephone Company and the respondent restricting the right to the use of their instruments, but the court held there was no right to discriminate and that the restricting clause was invalid, and it was said: "On the ground of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restricting clause was not contained in it."

The clause of the contract in this case which sought to restrict appellant from obtaining news from other sources than from appellee is an attempt at restriction upon the trade and business among the citizens of a common country. Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts. In People v. Live Stock Exchange, 170 Ill. 556, it was said (p. 566): "Efforts to prevent

competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law."

Section 8 of article II of the by-laws of the appellee sought to prevent any member of the appellee association from furnishing its special or other news to or receiving such news from any person declared by it hostile. In People v. Live Stock Exchange, supra, in speaking of the power to enact by-laws, and their effect, we said (p. 570): "When a corporation is created, there goes with it the power to enact by-laws for its government and guidance, as well as for the guidance and government of its members. This power is necessary to enable a corporation to accomplish the purpose of its creation. But by-laws must be reasonable and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the constitution and the general law of the land. They must not infringe the policy of the State nor be hostile to public welfare. * * * Attempts to place restrictions on trade and commerce, and to fetter individual liberty of action by preventing competition, are hostile to public welfare and affect the interests of the people. Such attempts by a corporation are an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits and not be permitted to exercise powers beyond those expressly conferred. The State provides for the creation of corporations. The corporation is its creature and must always conform to its policy. This duty on the part of corporations to do no acts hostile to the policy of the State grows out of the fact that the legislature is presumed to have had in view the public interest when a charter was granted to the corporation, and no departure from its charter purposes will be allowed which would be hurtful to the public.

The by-law of the appellee corporation above referred to is not required for corporate purposes nor included within the purposes of the creation of that corporation. To enforce the provisions of the contract and this by-law would enable the appellee to designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. Appellee would be power-

ful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish and could prejudice the interests of the public. Such a power was never contemplated in its creation and is hostile to public interests. That by-law tends to restrict competition, because it prevents its members from purchasing news from any other source than from itself. It seeks to exclude from publication, by any of its members, news procured from any other corporation or source than itself which it declares antagonistic to it. Its tendency, therefore, is to create a monopoly in its own favor and to prevent its members from procuring news from others engaged in the same business. Hence the provision is illegal and void. (Adams v. Brenan, 177 Ill. 194.) In Holden v. City of Alton, 179 Ill. 318, it was held that equity would enjoin the city from carrying out a contract for city printing at the suit of a tax-payer who was the lowest bidder on a contract, and whose bid was rejected because he did not employ members of a certain labor organization and could not show the label declared by the ordinance making such qualification to be essential, and it was held that such a combination or agreement was in violation of common right and tended to create a monopoly, and that could not be tolerated. To the same effect is Fishburn v. City of Chicago, 171 Ill. 338. The clear effect of this by-law is to create a monopoly, which renders it void.

The provisions of the contract that the appellant should purchase news from no other source, and the restrictive clause of the by-law, are both null and void, and the contract is the same as if these provisions had not been incorporated therein. Rejecting entirely these illegal provisions, on which the right to suspend the appellant as a member and to refuse to furnish it news and information gathered by the Associated Press for publication rests, no reason is presented, under the pleadings and affidavits in this case, why the appellant is not entitled to an injunction, as prayed for in its bill. The bill alleges that the deprivation of such reports by the Associated Press would cause an irreparable injury and damage to the appellant, which is sought to be prevented by the injunction prayed for in this bill.

We hold that the circuit court of Cook county erred in entering a decree dismissing the bill for want of equity, and the Appellate Court for the First District erred in affirming the

same. The judgment of the Appellate Court for the First District and the decree of the circuit court of Cook county are each reversed, and the cause is remanded to the circuit court of Cook county, with directions to enter a decree as prayed for in the bill.

Reversed and remanded.[1]

STATE EX REL. GWYNN v. CITIZENS' TELEPHONE CO., 61 S. C. 83.

(1901)

Mr. CHIEF JUSTICE MCIVER. This was an application, addressed to the Circuit Court, for a writ of mandamus, requiring the respondent to place a telephone in the relator's grocery store and one in his residence, in the city of Spartanburg, and to connect them properly with its exchange and its subscribers, and to do all acts necessary to afford the relator the like service and telephonic communication afforded to its other subscribers. The application was refused by the Circuit Judge and the relator appealed to this Court on the several grounds set out in the record, which it is not necessary to state here, as it will be sufficient to consider the several questions, as stated by counsel for respondent, in his argument here, which are presented by this appeal. * * *

The relator is now and has been since the 28th of June, 1898, engaged in the mercantile business, carrying on a retail grocery store in the city of Spartanburg, and occupies a residence in said city. The respondent, on the 16th day of August, 1898, became a corporation under the laws of this State, for the purpose of owning, constructing, using and maintaining electric telephone lines and exchange within the city of Spartanburg. * * * Some time in the year 1899, the respondent placed telephones in relator's residence and grocery store, giving proper connections with respondent's exchange and its subscribers or customers throughout the city of Spartanburg and elsewhere. This was done under an agreement with the relator that he would use respondent's telephones exclusively, and not the telephone of the Bell Telephone Company. Certain of respondent's sub-

[1] State v. Associated Press, 159 Mo. 410; 51 L. R. A. 151, contra.

scribers in the said city of Spartanburg, including most of the grocerymen, were furnished with telephones by the respondent, under a similar agreement, but some of respondent's subscribers, including some merchants, physicians and others and one groceryman, whose place of business was on the same street of said city as the grocery store of relator, were supplied with telephones by respondent under agreements which contained no such stipulation as to the exclusive use of respondent's telephones, and they were using both telephones. On or about the 6th of February, 1900, the respondent, learning that the relator had purchased Holland's market, in which there was a telephone placed there by the Southern Bell Telephone Company, a corporation duly chartered under the laws of this State, and that said market immediately adjoined relator's grocery store, and that relator had cut a door through the wall separating his grocery store from said market, thus opening a means of communication between the two structures, immediately removed, against the protest of the relator, the telephones which the respondent had previously placed in relator's grocery store and residence, for the avowed purpose of preventing the relator from using respondent's telephones while he was using the Bell Telephone—respondent claiming that under its agreement with relator he was bound to confine himself to the use of respondent's telephones. The relator tendered to respondent the amount due for the past use of respondent's telephones, which was accepted, thereupon demanded that respondent place one of their telephones in his grocery store and one in his residence, with proper connections with respondent's exchange and its subscribers; but the respondent refused to comply with such demand unless the relator would agree to use respondent's telephone exclusively, and not use the telephone which had been placed in said market by the Bell Telephone Company. * * *

We will next proceed to consider the several questions of law, growing out of the facts above stated, and presented by this appeal. These questions are thus stated in the argument here, on the part of the respondent, and we propose to adopt that statement. 1st. Is the defendant telephone company, in any sense a common carrier? 2. Can the defendant telephone company be required, in any case, against its will, to supply one of its instruments to petitioner? 3. Can the defendant telephone

company be required by mandamus, under the circumstances of this case, to so furnish its instruments to petitioner?

The first and, as it seems to us, the controlling question in the case, is, we think, conclusively determined by the provisions of sec. 3, of art. IX., of the present Constitution, which reads as follows: "All railroad, express, canal and other corporations engaged in the transportation for hire and all telegraph and other corporations engaged in the business of transmitting intelligence for hire, are common carriers in their respective lines of business, and are subject to liability and taxation as such," the balance of the section not being pertinent to the present inquiry. Now, if the respondent, "Citizens' Telephone Company," is a corporation, and is "engaged in the business of transmitting intelligence for hire," then it is expressly declared by the highest authority to be a common carrier. That it is a corporation, is not and cannot be denied; and, as we think, it is equally undeniable that it is "engaged in the business of transmitting intelligence for hire." Indeed, that, so far as appears in this case, is the only business in which it is engaged. The distinction sought to be drawn by counsel for respondent in his argument here, between the mode of transmitting intelligence or a message, as it is usually called by telegraph and by telephone, is a distinction without a difference, so far as the question with which we are concerned is involved. While it is true that a person desiring to send a message by telegraph to another usually writes out his message and delivers it to the agent of the telegraph company (though we see no reason why it may not be delivered by word of mouth, or over a telephone, as no doubt is frequently the case) and the agent transmits such message, through the agency of instrumentalities provided by the telegraph company, to another agent of such company at its destination, who writes it out, or delivers it by word of mouth or over a telephone, to the person for whom such message is intended, whereas a person desiring to send a message by telephone simply goes to the instrument provided for the purpose by the company at the central office and expresses his desire to be connected with the person to whom he wishes to speak, which being done by the agent of the company at the central office, the message is delivered directly to the person for whom it is intended, through the instrument and over the wires provided by the tele-

phone company for the purpose. In both instances the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive proper compensation; and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance; and although there are some differences in the mode of transmitting intelligence, yet the end sought and attained by each is substantially the same. Again, it is argued that there is another difference between the telegraph and the telephone which differentiates the former from the latter, and prevents legislative or constitutional provisions expressly applying to the former from being applied to the latter, and that is in the one case the purport of the message or intelligence to be transmitted must be known to the agent of the company, while in the other it need not be. In the first place, this difference does not always exist, as a matter of fact, for in many cases the purport of messages sent by telegraph is just as effectually concealed from the agent of the telegraph company as a message sent by telephone—in fact, more so—for in the case of a telegram in cipher, which is quite common, the purport of the message is entirely concealed, and is intended to be concealed from the knowledge of the telegraph operator and from every one else, except a person holding the key to the cipher; while, on the other hand, messages sent by telephone are not, as matter of fact, always concealed from the knowledge of the agent of the telephone company, nor from third persons who may choose to listen. But even if such differences did exist, it is difficult to conceive how that would affect the substantial identity of the business in which the two companies are engaged.

Again, it is argued that the framers of the Constitution being, as they were, familiar with the use of the telephone, would, if they had intended to include telephone companies within the provisions of the section of the Constitution above quoted, have mentioned such companies by name. This argument is based upon a misconception of the fundamental idea of the Constitution, which is that such an instrument is the organic law, and

deals with general principles, and does not and should not descend into details. But the conclusive answer to such argument is that the framers of the Constitution certainly did not intend to limit its operation to telegraph companies, as, otherwise, the additional words—"and other corporations engaged in the business of transmitting intelligence for hire"—would become wholly unmeaning and useless. These additional words were manifestly inserted for some purpose, and it is impossible to conceive of any other purpose except to include every other corporation, by whatever name it may be called, and by whatever means it conducts its business, which may be "engaged in the business of transmitting intelligence for hire;" and as we have shown that a telephone company is engaged in that business, telephone companies must be regarded as included within the terms of the constitutional provision.

The reference to sec. 3 (manifestly a misprint for sec. 4), of art. VIII., of the Constitution, and to the act of 1898, 22 Stat. 779, and also act of 1898, 22 Stat. 780, to support respondent's contention, will next be considered. This constitutional provision simply forbids the General Assembly from passing any law "granting the right to construct and operate a street or other railway, telegraph, telephone or electric plant, or to erect water or gas works for public use, or to lay mains for any purpose, without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such or like purposes." What possible bearing this provision can have upon the question we are considering, to wit: whether a telephone company can be regarded as, in any sense, a common carrier, it is impossible to conceive. Indeed, if it has any bearing at all, it would seem to be adverse to the contention of the respondent; for it seems to recognize the idea that when a telephone company establishes its plant in a town or city, it devotes its property to public uses, and thus brings it under legislative control. Nor do we see the relevancy of the two acts above referred to. The former forbids telephone companies from making unreasonable discrimination in the rates at which they furnish telephonic service to their patrons; and this necessarily implies that their business is subject to legislative control. The other act simply invests the railroad commission with power to regulate the charges

of express companies for transportation and the charges of telegraph companies for the transmission of messages. But until it is shown, as it is not and cannot be shown, that the power to regulate charges by law is a feature essential to the business of a common carrier, the provisions of this act do not even tend to show that a telephone company is not a common carrier. Indeed, as matter of fact, the rates of charges by all classes of ommon arriers, for example, steamboat companies, are not regulated by law.

But even if there were no constitutional provision and no legislation upon the subject, we are of opinion that this question is settled by the principles of the common law, which being elastic in their nature, may be applied to subjects and conditions which have but recently become known and used in the business of the country. In this State, we have no case, so far as we are informed, upon the question whether a telephone company is, in any sense, a common carrier; and we have only two cases relating to the somewhat analogous question as to whether a telegraph company is a common carrier, viz.: Aiken v. Telegraph Company, 5 S. C. 358, and Pinckney v. Telegraph Company, 19 S. C. 71; but neither of these cases decides that a telegraph company is, in no sense, a common carrier, though the contrary seems to be supposed (erroneously, as we think) by some. Both of these actions were brought to recover damages for errors in the transmission of messages sent over the lines of the telegraph company occasioned by the alleged negligence of the defendant companies. In neither of these cases was the question made or decided as to whether a telegraph company was a common carrier. On the contrary, in the Aiken case, Willard, J., in delivering the opinion of the Court, uses language implying that a telegraph company is a common carrier, for on page 370 he says: "It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons and the tender of their services to the community make them common agents for the transmission of messages for all persons who may desire and pay for such services to any person, either as the final receiver of such message or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the com-

mon carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit." It is true that on the next page the learned Justice does say: "The regulation of the defendants in conformity with which the terms of the contract limiting their liability was made was a reasonable regulation, and such as the defendants were authorized to make. In examining the proposition just stated, it must be borne in mind that the analogy between common carriers of goods and common carriers of messages is not perfect. The nature of the services performed differs materially in the two cases, and the real responsibility differs in a corresponding manner." That case, therefore, as we understand it, simply decides that where a telegraph company agrees to send a night message, which it is not bound to send under certain stipulations as to its liability in case of errors in the transmission of such message, such stipulations are reasonable and may be enforced, but the case throughout recognizes the doctrine that a telegraph company is a common carrier; though the analogy between common carriers of goods and common carriers of messages is not perfect owing to the fact that the nature of the services rendered differs materially in the two cases, and hence the measure of responsibility for any default in rendering the services must likewise differ. So in the Pinckney case, supra, the Court, while not undertaking to decide whether a telegraph company could in any sense be regarded as a common carrier, as no such question was presented in that case, simply decided that a telegraph company was not held to the stringent rule of the common law whereby common carriers of goods were held liable for all such losses and damages as they could not show resulted from the act of God or the public enemy, but were only liable for such losses and damages as they could not show were not due to the fraud or negligence of their agents or servants; and the reason for such a limitation of the rule was found in the peculiar nature of the business in which a telegraph company is engaged, differing in material respects from that of common carriers of goods. While it is true that the late Chief Justice Simpson, in delivering the opinion of the Court, does use

some expressions which may possibly seem to indicate that he thought a telegraph company was not a common carrier, yet that was not a question in the case, and, therefore, such expressions, even if amounting to what is claimed for them, are not authoritative. For, as the learned Chief Justice himself says on page 82, there is but a single question in the case, and he thus states that question: "The question to be considered, therefore, is whether telegraph companies are liable for all mistakes made in the transmission of messages except such as occur from any act of God or irresistible force, the onus of showing which is upon them."

In other jurisdictions, however, the question has been made and distinctly decided. Amongst the various cases which we have consulted we cite first the case of The State v. Nebraska Telephone Company, 17 Neb. 126, reported, also, in 52 Am. Rep. 404. In that case the facts were in substance very similar to the facts in the case which we are now called upon to decide, and it was there held that a telephone company cannot arbitrarily or capriciously refuse its facilities to any person desiring them and offering compliance with its reasonable regulations, and that mandamus will issue to compel the company to do its duty. The facts of that case were substantially as follows: The relator made an arrangement with the defendant company to place an instrument in his office, but for some reason failed to furnish the relator with a directory or list of its subscribers, with their numbers, which relator claimed was essential to the profitable use of the telephone, and which it was the custom of the company to furnish to its subscribers. After a time such list was furnished to the relator by the company, but when called upon by the company to pay for the use of the telephone in his office, the relator refused to pay for the use of the telephone during the time the company was in default in furnishing the directory or list of subscribers. Thereupon the defendant company removed the telephone from the office of the relator. Subsequently, the relator applied to the company to become a subscriber and to have an instrument placed in his office, which the company refused to do; whereupon the relator applied for a writ of mandamus to compel the company to comply with his demand. In that case the Court proceeded upon the fundamental doctrine that when a person or company, especially one who

is exercising its franchises under its charter, devotes its property to a public use by undertaking to supply a demand which "is affected with a public interest," it must supply all alike, who are alike situated, and cannot discriminate in favor of or against any one. In the course of the opinion, the Court uses the following language: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great part of the civilized world, cannot be questioned. It is, to all intents and purposes, a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

So in Chesapeake and Potomac Telephone Company v. Baltimore and Ohio Telegraph Company, 66 Md. 399, reported, also, in 59 Am. Rep. 167, Alvey, C. J., in delivering the opinion of the Court, uses this language: "The appellant (the telephone company) is in the exercise of a public employment and has assumed the duty of serving the public while in that employment. * * * The telegraph and telephone are important instruments of commerce, and their services as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering (themselves as) ready to serve some, refuse to serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

Again, in The State of Missouri ex rel. Baltimore and Ohio Telegraph Company v. Bell Telephone Company of Missouri, 23 Fed. Rep. 539, decided in 1885, Judge Brewer, now one of the As-

sociate Justices of the Supreme Court of the United States, after laying down the general principle that a corporation deriving its franchises from its charter, which devotes its property to public uses, puts its property into the channel of commerce, and thereby becomes subject to the control of the law regulating such commerce, uses this language: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case seems to have been carried by writ of error to the Supreme Court of the United States, but was never considered by that Court, for in 127 U. S. 780, we find this simple statement: "Dismissed with costs on the authority of the plaintiff in error," 18 April, 1888. In 25 Am. & Eng. Ency. of Law, at page 750, we find the following: "Telephone companies like telegraph companies are to some extent common carriers, and are bound to afford equal facilities to all. They can be compelled by mandamus to furnish facilities to one offering to comply with their regulations, even though such a party is a rival company." To same effect, see page 775 of same volume and on page 776 it is said: "In many of the States statutes exist which provide for the enforcement of these obligations; but it seems that the rule would be the same whether the obligation was declared by statute or considered as arising from the common law." For, as was said in State v. Nebraska Telephone Company, supra, in commenting on State v. Bell Telephone Company, 36 Ohio St. 296, where there was a statute upon the subject: "So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty), they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause of the act making its provisions applicable to telephones." Again, it is said in the same case: "Similar questions have arisen in and have been frequently discussed and decided by the Courts, and no statute has been deemed necessary to aid the Courts in holding that where a person or company undertakes to supply a demand which is affected with a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any." It is true, that in the more recent

edition of the Encyclopaedia above referred to, the rule is stated in a more modified form; see 6 Ency. of Law (2d ed.), at page 261, where the following language is used: "It was at one time attempted to class telegraph companies as common carriers, but the view universally adopted now is that they can in no sense be regarded as common carriers; they are like common carriers in that they are bound to serve impartially all those applying to them, but they are liable for improper transmission of messages only upon proof of negligence." So that it is apparent from the language which we have italicized in the foregoing quotation, that the rule, even when stated in its modified form, supports the contention of the relator, assuming, as we are authorized to do by the authorities, that the rule applicable to telegraph companies is also applicable to telephone companies—at least, so far as the obligation to serve all alike who apply for the use of the facilities which it offers to the public for the transmission of news is concerned.

We are satisfied, therefore, that while a telephone company may not be, in every sense of the term, a common carrier of goods, and as such subject to the same stringent rules which govern in ascertaining the liability of such carriers, yet, in one sense at least, it is a common carrier of news, and as such bound to supply all alike, who are in like circumstances, with similar facilities, under reasonable limitations, for the transmission of news, without any discrimination whatsoever in favor of nor against any one; and this is so under the well settled principles of the common law, without the aid of any constitutional or statutory provisions imposing such an obligation. The answer to the second question, under what has already been said, must necessarily be in the affirmative.

To dispose of the third question, it will be necessary to recur somewhat to "the circumstances of this case." The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a quasi common carrier of news, and as such was under an obligation to serve all alike who applied to it within reasonable limitations, without any discrimination whatsoever. When, therefore, the relator applied to the respondent to re-

place the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed. The reason given for its refusal—that the relator refused to agree that he would use respondent's telephone system exclusively—was not sufficient to relieve it from its obligation to serve the public, of which the relator was one, without any discrimination whatsoever; and especially is this so when it was admitted that the respondent was at the time affording to one person, at least, who was engaged in the same business as that of the relator, whose place of business was on the same street of the same city, the same facilities which the relator demanded, without requiring any such stipulation as that required of the relator, but who was in fact, using both telephone systems. It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell Telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper, unless such shipper would agree to patronize its line exclusively and not give any of its business to any competing railway line. Nor does the fact (if fact it be) that the relator had committed a breach of its previous contract with respondent, when he purchased Holland's market, in which an instrument of the Bell Telephone Company had been placed, and had thereby acquired the right to use the Bell Telephone, afford any reason why the respondent should decline to comply with relator's demand to furnish his grocery store and residence with its telephone instruments. If the relator had committed any breach of its previous contract with the respondent of which the latter had any legal right to complain, its remedy, as was said in one of the cases which we have consulted, was by an action to recover damages for such breach of contract, but not by refusing to perform its obligation to the public, of which the relator was one. As to the other reason suggested why the mandamus prayed for should not is-

sue under the circumstances of this case, to wit: that respondent did not have the means to comply with the demand of the relator within less than sixty days, it is only necessary to repeat what we have said above: that there does not appear to be any evidence in the "Case" to sustain the fact upon which this suggestion is based, and, therefore, it cannot now be considered. Besides, as is said above, that is a matter which may be considered when the case goes back to the Circuit Court, which can, in ordering the mandamus to issue, as herein directed, make suitable provision for allowing respondent reasonable time, if such shall be shown to be necessary, to comply with relator's demand.

As to the position taken in the argument—that mandamus is not the proper remedy—we think it entirely clear, both upon principle and authority, that mandamus is the appropriate remedy in a case of this kind.

The judgment of this Court is, that the judgment of the Circuit Court be reversed and that the case be remanded to that Court, with instructions to carry out the views herein announced.[1]

STATE ex rel. MASON v. CONSUMERS POWER CO., 119 Minn. 225; 137 N. W. R. 1104.

(1912)

PHILIP E. BROWN, J. Mandamus to compel the respondent to furnish electric service to the relator's residence in the city of St. Paul. An alternative writ was issued; but, after hearing had and upon findings made, such writ was quashed, whereupon from an order denying the relator's motion for a new trial, prayed for on the grounds that the court erred in overruling the relator's motion for judgment upon the findings, or for amended findings and judgment thereon, the relator appealed.

1. The respondent is, and during all the times hereinafter mentioned has been, a corporation duly organized and existing under the laws of this state, with power to generate, distrib-

[1] 15 Harv. L. Rev. 309.
Contract to employ one company only.—21 Harv. L. Rev. 62.

ute, and supply electric current for light, heat, and power, and other purposes, to the cities of the state and the inhabitants of such cities, and by virtue of certain ordinances is, and at all times material to the issues involved in this case has been, authorized to carry on its said business in the city of St. Paul. Being a corporation organized and empowered to perform a public service, and having accepted a franchise from the city authorizing it to operate therein, it is bound by the implication of the law to make no unreasonable discriminations between those to whom the said service is to be furnished; that is, it must not be partial, and must serve alike all who are similarly circumstanced with reference to its system, or who are members of any class to which it has undertaken or is otherwise bound to furnish service. State v. Board of Water & Light Commissioners, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 450, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182. This is the rule almost universally applied to telephone companies (State v. Board of Water & Light Commissioners, 105 Minn. 472, 477, 117 N. W. 827, 127 Am. St. Rep. 581; State v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; Chesapeake, etc., Telephone Co. v. Baltimore, etc., R. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Central Union Telephone Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, and note), water companies (Haugen v. Albina Light & Water Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A.), gas companies (State v. Board of Water & Light Commissioners, supra; Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321, and note), and electric light companies (Snell v. Clinton Electric Light etc., Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341; Cincinnati, etc., R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; Schmitt v. Edison Electric Illuminating Co., 58 Misc. Rep. 19, 110 N. Y. Supp. 44); and while the rule has never been applied in this state specifically to electric companies we feel no hesitancy in view of R. L. 1905, § 2927, giving them the right to use the highways of the state for the purpose of constructing their lines, etc., and of the decision in Minnesota Canal & Power Co. v. Koochiching Co., supra, that such service is a public service,

in aid of which the power of eminent domain may be exercised. Moreover, section 4 of the ordinance by which the respondent is authorized to exercise its corporate franchises in the city of St. Paul provides that the respondent "shall at all times during the life of this franchise [the franchise to operate in the city] furnish and supply electricity to all customers and applicants without discrimination and at reasonable rates," and "shall at all times during the life of this franchise use and exert every reasonable effort to continuously furnish an ample supply of electricity to all of its patrons along its entire system and all enlargements and extensions thereof."

Unquestionably, then, it was and is the respondent's duty to supply, without discrimination, electric service to all citizens of St. Paul whose property is so situated as reasonably to entitle them thereto under the ordinance and under the general law applicable to public service corporations, and to refrain from unjust discrimination between such citizens.

So the next question is: Does the relator come within this class? He claims that he does, on the ground that he is a member of a class rendered determinate by the respondent's own acts; that is, that his residence is within a service zone already established by the respondent—his ultimate claim of a violation of a legal duty due him from the respondent being that it is unjust discrimination to deny him the service. Prima facie, at least, we think that this claim is amply sustained by the findings, when the latter are taken together with the undisputed evidence; for it appears that the relator's premises are literally surrounded by residences which are served by the respondent. His residence is on lot 4, block 7, of Elmer & Morrison's rearrangement of Macalester Park, the lot being on the corner of Geneva and Amherst streets. Seventy-five feet to the north of this lot is Lincoln avenue, across which lies block 5 of the said rearrangement, and in this block it appears that four abutters on Lincoln avenue are served by the respondent. Likewise the house on lot 3, block 8, immediately across Geneva street, is so served, and also a residence on lot 3, block 10, Macalester Park, diagonally across Amherst street from the relator's lot, and even in the relator's own block 7 a residence to the east of the relator's house is served. In addition to this, it appears that several other residences in the blocks immediately

adjacent to block 7 are served; that the respondent actually has a pole and line less than 300 feet west of the relator's lot, another the same distance to the south, and a third about 250 feet to the east, and that every alley in the blocks to the east, west, and south of block 7 contains one of the respondent's lines, from which abutting lot owners are served, there being, however, no alley in block 7, and no line therein, except the individual service wire presumably necessary to connect the residence on lot 2 of this block with the respondent's line in the alley on which such lot abuts on the east. We think, therefore, that it is too clear for argument that the relator is within an established service zone, and, prima facie at least, entitled to the same service accorded to his neighbors.

2. The next question then is: Has the relator done all that he is called upon to do in order to invoke his right to equal service from the respondent? "The law requires them," said the court in Chesapeake, etc., Telephone Co. v. Baltimore, etc., R. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167, speaking of telephone companies, "to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations." It appears that the relator has had his house wired and equipped for the use of electricity, that he has made due application for service, has followed this with a formal demand therefor, and now holds himself ready to comply with any and all lawful conditions that may be imposed by the respondent. Is this not all that is usually considered necessary to be done by one desiring service from a public service corporation of the class to which the respondent belongs? It is a matter of common knowledge that, when an application is made by an individual for service from such a company, such as for water, gas, electric light or power, or telephone service, certain things have to be done in order to connect the applicant's premises with the company's system, and we think that it is equally well known that the company, and not the applicant, usually attends to such matters, except in so far as they may be controlled by special rules and regulations applicable to the particular service.

Now, the respondent makes no claim that the relator has failed to comply with any of its special rules or regulations. It does not even appear that the respondent has any such. It admits the relator's application and demand, and that his house

is equipped to receive the service, and yet refuses to furnish it, basing such refusal flatly, and, aside from the question as to the effect of a provision of the franchise ordinance as to extensions, hereinafter considered, solely upon the ground that the relator has not procured for it a right of way to his premises. More specifically stated, the claim is that, in order to reach the relator's premises without crossing private property belonging to others, a line must be strung across Amherst street, and possibly Geneva street, and that probably a pole will have to be set in one of these streets; that the franchise ordinance makes the city's consent a condition precedent to the right to do these things, or either of them; that no consent has been obtained; and hence that the respondent cannot be compelled to furnish the service to the relator. The respondent's contention is that this consent must be obtained by the relator before he can insist upon being served by the respondent, or at least it must appear that the respondent has the right to string a wire over these streets, and, if necessary, to set poles therein. In our view of the case, however, the obtaining of whatever consent may be necessary in order to authorize the poles as above indicated, is a matter which must be attended to by the respondent and with which the relator has no direct concern. In other words, the consent of the city, if necessary, is merely one of the incidental details involved in the performance of the respondent's ultimate duty to furnish light to those properly applying therefor. These matters, as we have already noticed, are usually looked after by the public service companies, and not by the applicants for service. * * *

Such, then, being the general custom, the question is at once suggested as to whether this custom was followed by the respondent in its dealings with its patrons generally throughout the city, and particularly in the service zone involved in this case, or, rather, the question is whether there is any evidence in the case of a different custom. * * * But upon the record before us there can be but one answer to this question, for there is no suggestion in either the pleadings or the evidence to indicate that the respondent has ever followed any other than the general custom. * * *

In the absence, then, of evidence of a contrary custom, it must be held, upon this record at least, that the respondent has not

required other patrons and applicants to procure for it a right of way upon and across the streets necessarily used or crossed in carrying the service to them and that such is not the respondent's usual custom. And it follows that, in requiring this of the relator, the respondent has discriminated against him. Cincinnati, etc., R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; Snell v. Clinton Electric L., etc., Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341. In the Ohio case above cited difference in rates was held to be discrimination and in the Illinois case it was held that it was discrimination to require one applicant to pay for the converter used in connection with the service supplied to him, when other patrons were not subjected to similar charges.

We have not adverted to the feasibility of reaching the relator's premises by way of an underground conduit, although it appears that the consent of the city to this method of construction is not necessary under the terms of the franchise ordinance. Nor have we discussed the question of the respondent's right to employ its power of eminent domain in order to obtain a right of way over any private property that it may be necessary to cross in order to give the relator the service applied for by him, though it appears that by such a right of way the relator's premises could be reached from the respondent's nearest pole to the east thereof, and less that 250 feet distant therefrom, without crossing any street or alley. With regard to these matters, it is sufficient to say that they are in the same category with the matter of right of way upon or across the streets with overhead wires. With the possibility or feasibility of any one or more of these methods of bringing the service to him, the relator has nothing to do; nor can he dictate the manner in which his premises are reached. These are matters which the respondent has the right to determine for itself, and must determine; and if each of these ways of carrying the service to the relator was barred by unsurmountable difficulties, whether legal or physical or financial, the burden was upon the respondent to show such fact, and to sustain this burden there must, of course, be some showing of a bona fide attempt to reach the relator with the service, and a failure thereof, or else proof of the futility of such an attempt.

3. The respondent's only other contention is that the relator has mistaken his remedy, in that his petition should have been addressed to the city council, and not the court. Section 8 of the franchise ordinance, says the respondent, required the relator to make application to the city council to compel an "extension" of the respondent's lines.

Counsel for the respondent assumes that the line necessary to reach the relator's premises would be an "extension"; but to this we cannot agree. We think it apparent that the relator's premises may be reached with a mere subsidiary line, and we are satisfied that such lines are not "extensions" within the purview of section 8 of the ordinance. It would be an unwarrantable construction of this section to hold that it requires every applicant for service within an established service zone to apply to the council in order to obtain service connections.

But we do not think that section 8 of the ordinance was intended to affect the mutual rights and relations of the company and the individual consumers. Before this franchise ordinance was enacted the respondent's predecessor, and so the respondent, had no right whatever to maintain its system in the city of St. Paul. R. L. 1905, § 2927. Its right, therefore, to operate in the city, is derived from the franchise ordinance, and by such ordinance such right is subjected to certain conditions. * * * We do not deem it necessary to pass upon the question as to what extent the city could have relieved the company of its statutory duty to perform its functions as a public service corporation. We merely hold that by this ordinance no attempt has been made either to enlarge or restrict such duty. The ordinance simply gives permission to operate in the city, subject to certain conditions operative between the company and the city as such, and leaves untouched the duties of the company, as a public service corporation, to its patrons and applicants for service, except in so far as section 4 expressly declares the already existing duty of the company to furnish reasonable service without discrimination.

Aside from the effect of section 8 of the ordinance, mandamus is unquestionably the proper remedy; and since, as we have held above, this section is not applicable in the instant case, the respondent's contention that the relator has mistaken his remedy cannot be sustained. * * *

And, the respondent having failed to meet the prima facie case made out by the relator, it follows that the relator is entitled to relief. Where the respondent, in mandamus to compel the furnishing of a public service, fails to establish its affirmative defense, the relator, if he has made out a prima facie case, is entitled to the writ. Schmitt v. Edison, etc., Co., 58 Misc. Rep. 19, 110 N. Y. Supp. 44, 45; State v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870. * * *

The relator is entitled merely to a writ, based upon amended findings as above stated, ordering the respondent to furnish him with electric service, within such reasonable time as the court below may fix, after hearing had for the determination of that question only, without direction as to manner in which the respondent shall perform its duty in such regard. State v. Renville County, 83 Minn. 65, 69, 85 N. W. 830.

Order reversed, with direction to proceed in accordance with this opinion.[1]

DUFFIE v. BANKERS' LIFE ASS'N OF DES MOINES, 139 N. W. R. 1087. (Ia.)

(1913)

LADD, J. The plaintiff is the widow of Joseph M. Duffie, who departed this life July 9, 1911. He had applied to the defendant association on June 8th preceding for a certificate of membership therein, stipulating the payment of an indemnity of $2,000 upon his death; but the association had failed to accept or reject the application, and, in this action, recovery of that amount as damages is sought by plaintiff, who was named as proposed beneficiary in the application. The widow, as a duly appointed and qualified administratrix, filed a petition of intervention. * * *

It is to be observed that the petition does not proceed on the theory that from the retention of the application an unreasonable time without acting thereon acceptance of the application is to be presumed, nor on the theory that defendant is estopped

[1] Mandamus.—21 Harv. L. Rev. 448.

from denying such acceptance because of having misled the applicant in some way. See Winchell v. Iowa State Ins. Co., 103 Iowa, 189, 72 N. W. 503. The action is not based on contract either express or implied, but solely on tort; the theory of the plaintiff being that, having solicited and received the application for nsurance, it owed the applicant the affirmative duty either of rejecting the application or of accepting it within a reasonable time, and upon breach of such duty it is liable for all damages suffered in consequence of such breach. Let us first ascertain whether the evidence was sufficient to carry the issues involved in such a claim to the jury.

I. Might defendant have been found to have been negligent? The association was responsible for the conduct of Rogers when acting within the scope of his agency, and it is admitted that he allowed the application to lie on the physician's desk a month lacking a day, though it was his duty to forward it promptly to the association. But he was not alone at fault, for the association was aware as early as June 12, 1911, that the application had been taken, and yet did nothing in the matter during the 27 days intervening * * * his death. In the case of another application taken at about the same time and in the same vicinity there was a delay of but 19 days in issuing the certificate. We think whether defendant in the exercise of ordinary diligence should have passed on the application prior to Duffie's death was fairly put in issue. The association was bound by the acts of its agents and chargeable with any consequences that resulted from the failure of Rogers to promptly forward the application and physician's report. In other words, if the association was under a duty to promptly act on the application and notify Duffie, as we think it was, it cannot shield itself from the responsibility by the fact that the application and medical report had not been received by it and therefore it could not act. See Northwestern Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211. The possession of these by its agent had the same effect as if they were in possession of the association at its home office. Assuming then that the application and medical report had been promptly forwarded by the agent, and that the application was not accepted or rejected within the time intervening prior to his death, it seems manifest that whether this was

an unreasonable delay was for the jury to determine, and we so hold.

II. But it is argued that it was as much the duty of the applicant to inquire as it was that of the insurer to give the information, and this or similar expressions will be found in several decisions holding that mere silence on the part of the insurer is not as strong evidence of acceptance as of rejection. Whether this were so or not, as bearing on whether an acceptance should have been inferred, it cannot be said that the duties of the parties were reciprocal. The applicant had done all he could or was required to do in the matter. He had the right to assume that the application would be forwarded immediately after the medical examination and was so assured. This, with the suggestion that the certificate would be in effect after passing the physical examination, was well calculated to lull him into supposed security. Moreover, about all he could have done was to withdraw his application and apply to another insurer for a policy, and this, one who has applied to a company of his choice would quite naturally hesitate to do. Under the circumstances, it cannot be said, as a matter of law, that the deceased was at fault in not stirring defendant to action by inquiry as to the cause of delay or in not withdrawing his application. At the most, this also was an issue appropriate for the determination of the jury.

III. Assuming then that the defendant was negligent and Duffie without fault, as the jury might have concluded, can it be said that but for such negligence a certificate of insurance would have been issued? We think the jury might have found that, in all reasonable probability, had the association passed upon the application, it would have been accepted. Duffie was a young man of 32 years, his medical examination was satisfactory, and the physician had recommended him; his employment as a farmer was not hazardous, and his character all that could be desired. * * *

But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. The view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public

to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do. Otherwise the applicant is unduly delayed in obtaining the insurance he desires, and for which the law has afforded the opportunity, and which the insurer impliedly has promised, if conditions are satisfactory. Moreover, policies or certificates of insurance ordinarily are rated as of the day the application is signed, and, aside from other considerations, the insurer should not be permitted to unduly prolong the period for which it is exacting the payment of premium without incurring risk. What was said in Northwestern Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211, is pertinent; "If in this case there was evidence that the company was induced to reject the application for the sole reason that Neafus died before it acted upon it, or to show that his application, except for the fact of his death, would have been approved, we would have a very different question. We think there is a sound and well-defined distinction between a case in which the application under no circumstances would have been accepted and a case in which it would have been accepted, except for the fact that the applicant died before it was acted upon, and after the company had a reasonable time in which to act. While the application and receipt are to be treated merely as a proposal for insurance that it is with the company at its election to accept or reject, it may well be said that the company must act honestly and fairly on the application submitted to it, and which it impliedly at least agreed to accept, if satisfactory to it; and that if an application is satisfactory, and the company, if it acted in a reasonable time, would have accepted the risk, it should not be allowed after holding the application for an unreasonable time to reject it, solely because of the death of the applicant. But, treating the case as we find it in the record, the delay, however unreasonable it may have been, cannot be construed into an acceptance of an

application that no well-managed company, in the ordinary course of its business, would have accepted."

In Boyer v. State Farmers' Mutual Hail Ins. Ass'n, 86 Kan. 442, 121 Pac. 329, 40 L. R. A. (N. S.) 164, recovery for the amount of insurance applied for was awarded because of negligent delay in not issuing the policy until after the loss, and in a note to the case as reported in 40 L. R. A. (N. S.) 164, the annotator says that: "Whatever may be the decision of the jury on this question (delay), it cannot be doubted that the proposition that an insurer should be held liable for a loss sustained by an applicant for insurance because of the negligence of the insurer's agent in failing to forward the application within a reasonable time is sound."

In Walker v. Farmers' Ins. Co., 51 Iowa, 679, 2 N. W. 583, the trial court instructed the jury that, if the agent had only the power "to receive and forward applications to the company for their approval or rejection, then, as such, he would be held to the use of ordinary diligence, and the defendant would be liable for his negligence in the performance of such duty; and if you find that said agent neglected to forward such application for rejection or approval within a reasonable time, considering all the circumstances, then the defendant must be held liable for any loss occasioned by such neglect." Of this, the court said: "It may be, but the point we do not decide, that defendant is liable for the neglect of its agent as contemplated in this instruction; but in order to recover for such negligence the action must be based thereon and the petition must so declare." And the instruction was held to be erroneous for that no such issue was raised on the pleadings. We are inclined to the opinion that the principle announced in this instruction is sound and that the facts of the case were such as to require its application.

IV. The application named plaintiff as his beneficiary, and, had the certificate issued, likely she would have been named therein as such. But there was no contract, and the negligence, if any, was that of failing to discharge a duty owing the deceased. Had the certificate issued, whether plaintiff or some one else were beneficiary would have been optional with the insured, and as the injury, if any, was to him, his representative alone can maintain the action for resulting damages. See Schmidt v. Association,

112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323.

As to plaintiff the judgment is affirmed. Because of the error in not submitting the issues to the jury, the judgment against the intervener is reversed.[1]

[1] 18 Harv. L. Rev. 135.

Public places of amusement.—19 Harv. L. Rev. 472.

Mandamus.—21 Harv. L. Rev. 448.

Injunction against strike.—16 Harv. L. Rev. 518.

Consolidation prohibited.—21 Harv. L. Rev. 633.

Right to withdraw from public calling.—16 Harv. L. Rev. 363, 555-566; 22 Harv. L. Rev. 367, 386; 23 Harv. L. Rev. 646.

Valuation as basis for determining rates.—25 Harv. L. Rev. 173. 195, 379.

Inter-state or intra-state commerce.—12 Harv. L. Rev. 278.

Government ownership.—16 Harv. L. Rev. 476-490.

Government regulation.—15 Harv. L. Rev. 249-270, 353-381; 16 Harv. L. Rev. 1-21.

Eminent domain.—20 Harv. L. Rev. 649.

"Examples of the restriction of competition under the manorial system may be seen in: Y. B. 3 Ed. III. 3; Y. B. 11 H. VI. 19; Fermor v. Brooke, Cro. Eliz. 203; Hix v. Gardner, 2 Bulst. 195; Fitzwaller's case, 3 Keeble 242; under the gild system in: Davenant v. Hurdis, Moore 245; London case, 5 Co. 616; Wagoner's case, 8 Coke 121; Warmel v. London, 1 Strange 675; Gunmakers v. Fell, Willes 384; Rex v. Surgeons, 2 Burr. 892.

"Examples of the limitation of franchise may be seen in: Charles River Bridge v. Warren Bridge, 11 Pet. 420; Horse Railway v. Cable Railway, 30 Fed. Rep. 388; Gas Co. v. Gas Co., 25 Conn. 19; Illinois Canal v. Chicago R. R., 14 Ill. 314; Turnpike Co. v. Railroad, 21 Vt. 895; Canal v. Va. R. R., 11 Leigh. 73.

"Examples of franchises to establish a legal monopoly subject to strict regulation may be seen in: Binghampton Bridge, 3 Wall. 75; Sands v. River Improvement, 123 U. S. 288; Boston, etc. R. R. v. Salem, etc. R. R., 2 Gray 1; St. Louis St. Ry. v. Northwestern St. Ry., 69 Mo. 65.

"Legal monopoly has its correlative legal obligations: Allnutt v. Inglis, 12 East. 527; Davis v. State, 68 Ala. 58; Dock Co. v. Garrity, 115 Ill. 155; Nash v. Paige, 80 Ky. 539; Ryan v. Terminal Co., 102 Tenn. 119; Barrington v. Dock Co., 15 Wash. 175; Shepherd v. Milwaukee Gas L. Co., 6 Wis. 539; In re Pryor, 55 Kans. 730; Lumbard v. Stearns, 7 Cush. 60; Gas Co. v. Calliday, 25 Md. 1; Wood v. Auburn, 87 Me. 287; Griffin v. Water Co., 122 N. C. 206; Cincinnati R. R. v. Bowling Green, 57 Oh. St. 366; Price v. Riverside Co., 56 Cal. 431; Wright v. Platte Co., 27 Col. 322; Hockett v. State, 105 Ind. 250; Mann v. Log Co., 46 Mich. 38; People v. New York, etc., R. R., 28 Hun. 543.

"The following cases, among others, hold the water companies to be in public calling: Spring Valley Works v. Shoutes, 110 U. S. 347; Smith v. Water Works, 104 Ala. 315; Water Co. v. Fergus, 178 Ill. 571; Shiras v. Ewing, 48 Kans. 170; Water Co. v. Adams, 84 Me. 472; Turner v. Water Co., 171 Mass. 336; McDaniel v. Water Works, 48 Mo. 273; American Water Works v. State, 46 Neb. 1194; Olmstead v. Morris Aqueduct, 47 N. J. L. 335; Silkman v. Water Comm'rs, 152 N. Y. 327; Griffin v. Goldsboro Water Co., 112 N. C. 206; Brymer v.

WYMAN: THE LAW OF THE PUBLIC CALLINGS, ETC., 17 Harv. L. Rev. 156-173, 217-247; 20 Harv. L. Rev. 512-531: 23 Harv. L. Rev. 339-352.[1]

In public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the

Buller Water Co., 179 Pa. St. 231; Watauga Water Co. v. Wolfe, 99 Tenn. 429.

"The following decisions, among others, hold the gas companies to be in public calling: Montreal Gas Co. v. Cadreux (1899), A. C. 589; Gibbs v. Gas Co., 130 U. S. 396; Smith v. Gas Co., 132 Cal. 309; Coy v. Gas Co., 146 Ind. 655; In re Pryor, 55 Kans. 730; Louisville Gas Co. v. Drelaney, 100 Ky. 408; Gas Co. v. Calliday, 25 Md. 1; Williams v. Gas Co., 52 Mich. 599; People v. Manhattan Gas Co., 45 Barb. 136; Lanesville v. Gas Co., 47 O. St. 1; Bailey v. Fayette Gas Co., 193 Pa. St. 175; Hotel Co. v. Gas Light Co., 3 Wash. 316; Shepherd v. Milwaukee Gas Co., 6 Wis. 539.

"The following decisions, among others, hold the telephone companies to be in public calling: State v. Telephone Co., 23 Fed. Rep. 539; Hockett v. State, 105 Ind. 250; Telephone Co. v. Talley, 118 Ind. 194; State v. Telephone Co., 17 Neb. 126; People v. Hudson Telephone Co., 19 Abb. N. C. 466; State v. Telephone Co., 36 Oh. St. 296; Telephone Co. v. Com., 3 Atl. Rep. 825; Gardner v. Telephone Co., 23 R. I. 312; State v. Citizens Telephone Co., 61 S. C. 83; Telephone Co. v. Telephone Co., 61 Vt. 241.

"The following decisions, among others, hold the electric companies to be in public calling: Snell v. Clinton Electric L. Co., 196 Ill. 626; Andrews v. Electric Light Co., 53 N. Y. Supp. 810; Cincinnati R. R. v. Bowling Green, 57 Oh. St. 336.

"In effect the following cases, among others, hold grist mills to be in public calling: Blair v. Cumming County, 111 U. S. 363; Boston Mill Corp. v. Newman, 12 Pick. 467; Trader v. Merrick County, 14 Neb. 327; Scudder v. Trenton Falls Co., 1 Saxt. Ch. 694.

"In effect the following cases, among others, hold irrigation companies to be in public calling: Fallbrook District v. Bradley, 164 U. S. 112; Lux v. Haggin, 69 Cal. 225; Land Creek Co. v. Davis, 17 Col. 326; Slosser v. Salt River Co., 65 Pac. Rep. 332; Paxton Co. v. Farmers' Co., 45 Neb. 884; Umatilla Co. v. Barnhardt, 22 Ore. 389; Irrigation Co. v. Vivian, 74 Tex. 170.

"There is no reason to suppose that the pipe line companies are not in public calling: West Va. Pipe Line Co. v. Ohio River Pipe Line Co., 22 W. Va. 604. Cf. (Subway) Bush Electric Co. v. Consolidated Subway Co., 15 N. Y. Supp. 81.

"These cases, among others, hold in effect that the cemeteries are public service companies: Oakland Cemetery v. St. Paul, 36 Minn. 529; Re Deansville Cemetery Ass'n, 66 N. Y. 509; Henry v. Trustees, 48 Oh. St. 671; Cemetery Ass'n v. Redd, 33 W. Va. 262.

"The following cases, among others, hold that wharfingers are in public calling: Robertson v. Guilder, 69 Ga. 340; District v. Johnson, 1 Mackey 51; Aiken v. Eager, 35 La. Ann. 567; Steamship Co. v. Elevator Co., 75 Minn. 312; Buffalo v. Railway, 39 N. Y. Supp. 4; Ryan v. Terminal Co. 102 Tenn. 119; Barrington v. Commercial Dock Co., 15 Wash. 170." [17 Harv. L. Rev. 156-173, 217-247.]

[1]Articles are greatly abridged.

demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discrimination. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the trusts are carrying on a predatory competition under the cover of the law of (private business) that we have the trust problem. If the law of public business might be enforced against the trusts, it is believed that a solution of the problem would be found.

In Plantagenet England, as we see it through the medium of our earliest law reports, the mediaeval system was breaking down and modern organization springing up. Restriction of trade with some freedom had been the old policy, freedom of commerce with some restriction was the new ideal. Great as was the change from the old economy to the new theory, it was not complete. The essential distinction between the obligations of those who were in public employment and the duties of those who were in private business was observed as one of the fundamental things in the legal system.

During the nineteenth century the common carrier has become of such consequence in the industrial organization, as the very condition of modern commerce, that the other public callings have been overshadowed and have been at times almost lost to sight; but in the fifteenth century barber and surgeon, smith and tailor, innkeeper and victualer, carrier and ferryman were of more or less equal concern to the law. Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern market does not call for it; but innkeeper, victualer, carrier, and ferryman are still in that classification, since even in modern trade the conditions require it.

The essential thing in all this is the recognition of the common calling as a thing apart from the private calling, presenting different conditions, involving the necessity therefore of further law than that which suffices to regulate ordinary businesses. What elements in the situation are so characteristic that the realization of them should lead to some conception of the nature of the public employment? Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing: that in the private calling the situation is that of virtual competi-

tion, while in the public calling the situation is that of virtual monopoly.

If the courts could have had their way in the early days, the ordinary trades would have been immediately opened to all. The great Case of Monopolies (9 Co. 84) shows an extraordinary prejudice against that famous patent of the crown for the making of cards. Of late years, however, another point of view has been taken which regards as valuable the creation of exclusive franchises as a method of dealing with the public service situation. This is shown by the modern definition of a franchise in California v. Pacific Railroad, (127 U. S. 1): "A franchise is a right, privilege, or power of a public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security."

Experience has shown that the truth of the matter is that the imposition of an occasional monopoly may be advantageous in the ordering of the industrial system. This is the method taken by the modern state for dealing with the troublesome problems of the public utilities. Many of the public works can be conducted with advantage only upon the basis of exclusive franchise. A single system of telephones can alone serve satisfactorily to bring together all the telephone users of a community. The waste by duplication of plants is so scandalous that the ultimate benefit to the community from giving an exclusive franchise, as to one gas company for example, must be admitted, when the futility of expecting any permanent competition has been so long exposed. It is necessary for the perpetuity of competitive conditions in general, that, in the particular instances of monopolistic conditions, the state should proceed to establish a legal monopoly, and then apply to that situation such strict regulation as the exigency demands.

Wherever virtual monopoly is found the situation demands this law that all who apply shall be served, with adequate facilities, for reasonable compensation and without discrimination; otherwise, in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these

industrial wrongs. This is as true of actual monopoly as legal monopoly. Both are included within the law of public employments.

What tests will indicate whether or not a business has attained such control of its market as to become of the class of public employments? The chief element which makes the business of supplying water to a community a public calling is the natural limitation of the sources which makes the interposition of the state in aid of the enterprise necessary; in the case of gas, it is the control of the market; in the case of the telephone, it is the cost of the duplication of the plant; in the case of electricity, it is the fact that a substitute will cost more than the original. In most cases all of these conditions exist. These are the conditions that deter competition and foster monopoly.

Freedom can be allowed only where conditions of virtual competition prevail. In conditions of virtual monopoly, without stern restrictions, there is always great mischief. It is no inconsistency for the state to leave the generality of business free from restrictions, while controlling with strict code such lines of industry as are affected with a public interest.

It may be objected that in the case of most of the public service companies a characteristic fact has been that the corporation in question has enjoyed some privilege or other from the state, for example: eminent domain, use of the streets, aid out of taxation, or actual operation by the state. The question thus arises whether, after all, the public employments extend further than the public privileges; whether virtual monopoly can give rise to a public calling, if the state has had no hand in the establishment of the situation. Under our constitutional system the right of eminent domain cannot be granted to any business corporation unless it be a public service company, otherwise there will not be that public purpose which is necessary to justify the taking. In the same way state aid cannot be extended to a commercial enterprise unless it be a public calling, for there will not be the public purpose necessary in taxation. It is common to argue that because a certain business has had a certain privilege granted to it, the consequence follows that the business is put by the courts in the class of public callings. But the real truth of the matter seems to be in the opposite statement that no business can be granted a privilege under our

constitutional system unless it is a public calling.

What businesses, then, are so affected with a public interest that they are made of such public consequence that the public has an interest in their control? Profession of a willingness to serve the public is not the sole test; for that would include all the small shops as well as the great exclusive industries. In the case of Munn v. Illinois and the cases following it the conditions surrounding the industry, and these alone, are held enough to put the business within the law of public calling. That position of affairs may be summed up in a single phrase—virtual monopoly will cover everything. Nothing narrower will do. It is submitted that any business is made out to be a public calling in which there is, from the nature of things, an inherent virtual monopoly.

Virtual monopoly must now be differentiated from virtual competition. Upon this difference our constitutional law turns. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature; on the other hand, if virtual competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. In the public calling regulations of service, facilities, prices, and discriminations is possible, to any extent. Such monopolistic conditions demand such policy; in no period has this been more apparent than now. In the private callings, however, no such legislation should be permitted; in no epoch has it been more necessary to insist upon this. Take the Associated Press, or the United States Steel Corporation, or especially the Standard Oil Company. In all these businesses competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in many of the great industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. The corporations conducting these businesses, having devoted their property to a use in which the public has an interest, have in effect granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created.

Our law has always held artificial monopoly to be an odious thing. Attempts by those in a given trade to control the markets have been held illegal. To form such combination has been held actionable conspiracy. It is upon this basis that our modern anti-trust statutes have been rested. These laws demand competition through thick and thin. They regard monopoly as always unnatural. The modern legislator makes no discrimination between times and places. The effect of this uncompromising position has been the abandonment of loose forms of organization and the general adoption of the gigantic corporate form (a new monopoly which is not a combination). The trust problem now is, shall these corporations be destroyed, or shall they be regulated?

Our law reports are full of the industrial wrongs that the trusts are perpetrating. Chief of the predatory raids of these robber trusts are their discriminations. A course of dealing which was fair enough in carrying on a smaller business is essentially unfair in the conduct of the later larger business. Our courts are going to do something to protect the ordinary man in business from such competition by such combinations. The contention is that the time has come to put these great businesses under the law of public calling. The enforcement of this law would put an end to the worst abuses of the present trusts. It would compel them to serve without discrimination. It also would compel them to serve for a reasonable price, that is, a fair return upon their actual investment. * * *

It is ordinarily said, that those who have undertaken a public service owe a duty to the public in general, whatever may be their inclinations. But it will be found upon inquiry that in the case of every public calling service is legally due to persons belonging to a special class, and not to every member of the public, as such. In certain public employments the public duty is owed only to travelers. This is true of inns and carriers of passengers. However, incidental duties may be owed to other persons, as to persons who come to help passengers, or to visit guests. In several of the public services the undertaking is limited to the occupiers of the premises. This is true of water companies, gas companies, electric companies, and telephone companies. Where it is true that only a certain class can be in a position to demand service the propriety of confining service to that class is

obvious. The public profession and proper obligation of a sleeping car or parlor car company is subject to this sort of limitation. Its services are tendered only to passengers on the train to which its cars are attached, and indeed only to such passengers as the carrier permits to ride in the cars of the company.[1] * * *

The same business policies, which are justifiable in private enterprises, are not justifiable in public employments. The first may refuse to have any dealings with a customer who persists in patronizing a rival, or make a lower price to customers who will give exclusive patronage, but the second may not. The first may make lower proportionate rates to larger than to smaller customers, or even decline to deal with very small customers, but the second may not. (Of course a proportionate reduction may be made to the customer who has services in more convenient units.) The first may make special concessions for special kinds of business, in which the ordinary prices could not be afforded, but the second may not except to make special bargains in individual cases with reference to the performance of outside business without committing themselves to serve all that apply. The first may base their business policies upon the elementary principles of the law of increasing returns, but it is submitted that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. Private business may refuse to deal with rivals, but those who are in public employment must give their rivals such service as other members of the public might require, although this does not give one public company the right to demand the use of the facilities of another company in order to compete against it. It would seem that the same distinctions should apply in the case of subsidiary businesses and collateral businesses; otherwise the public might suffer. For example, if railways may charge express companies extortionate prices, the express companies might charge these against the general shipping public as necessary operating expenses. If a public service company is engaged in two kinds of business, it may not do what might be done in private enterprises,—give itself preference over its rivals. En-

[1] 15 Harv. L. Rev. 571; 23 Harv. L. Rev. 577-589.

tangling alliances between public service companies and private businesses must be forbidden, whenever their interests might come in direct conflict with the interests of those whom they have undertaken to serve.[1]

[1] 23 Harv. L. Rev. 54, 69, 646.

CHAPTER VIII.

INNKEEPERS

1. Creation of Relation.

THOMPSON v. LACY, 3 B. & Ald. 283.

(1820)

Trover for goods, which defendant claimed to detain on account of money due him for lodging and entertainment provided plaintiff. The plaintiff was nonsuited. Defendant did not have any stables in connection with his house.

Abbott, C. J. The defendant in this case keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided. Now it appears to me, that the defendant cannot be distinguished from a person who keeps an inn in the country, in the way of travelers. We should otherwise be obliged to say that a person who arrives at a house of public entertainment in a post-chaise, and desires to have his supper and bed, meaning to go away on the following morning, would be a traveler, and that the landlord who gave him the accommodation required, would be an innkeeper: and yet that if such a guest then removed to the defendant's house, the latter, although he should give him the same accommodation, would not be an innkeeper. Such a distinction would lead to a very nice inquiry in each particular case. It seems to me, therefore, that it would be better both for the persons who keep such houses and for those who frequent them, that we should consider this house as falling within the rule of law applicable to inns. By so deciding, the guest will have the protection of the law for the

security of his goods, if they are lost or stolen, and the person who keeps the house will also have the benefit of the law, which allows him to retain the goods of his guest to insure the payment of his demand. I am now speaking of a case where the party was in the habit of sleeping in the house. As I cannot, therefore, distinguish a house like that of the defendant, who furnishes every accommodation to all persons for a night or longer, from a country inn, I think that the nonsuit was right, and that this rule must be discharged.

BAYLEY, J. I am of opinion that this is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now this house was used for the purpose of giving accommodation to travelers, who, in London, reside either in lodgings or inns. The defendant did not merely furnish tea and coffee as the keeper of a coffee-house does, nor a table as the keeper of a tavern does; but he provided lodgings, and that in the way they are provided at inns: for the charge was at so much per night. In the Six Carpenters' Case (8 Coke, 290), a tavern is so far considered an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveler is furnished with everything which he has occasion for whilst upon his way. It has been said, however, that in London the character of inn belongs only to those houses of public entertainment frequented by wagons and stage coaches. Now if the liability of a party as innkeeper depended on such a circumstance, it would follow that a person coming to such a house as this from the country in his own private carriage, or in a post-chaise, could not be entitled to consider the owner as responsible for the safety of his goods. It has also been urged that to constitute an inn there should be stables annexed to it: if that were so, many inferior houses of entertainment in the country, frequented by foot travelers, would not come within the description; and the poorer travelers would not have the protection which the law gives to a guest against an innkeeper. I think, therefore, that in point of law this is an inn, and that the defendant is under the obligation to which innkeepers are liable, viz., that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their

goods, if lost or stolen; and, on the other hand, that he has a lien on the goods of his guests for the payment of his bill. This rule must, therefore, be discharged.

BEST, J. I am of opinion that the defendant's house, under the circumstances of this case, is to be considered as an inn. The consequences of which is, that he has a lien on the goods of his guests; and, on the other hand, that he is responsible to them for property left in his care. An inn is a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. In this case, the defendant does not charge as a mere lodging-house keeper, by the week or month, but for the number of nights. A lodging-house keeper, on the other hand, makes a contract with every man that comes; whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all, at a reasonable price. I think, therefore, this rule should be discharged.

Rule discharged.

CROMWELL v. STEPHENS ET AL., 2 Daly (N. Y.) 15.

(1867)

Motion for an injunction.

This action was brought by Charles T. Cromwell against Thomas Stephens and others, composing the Croton Aqueduct Board, for the purpose of obtaining an injunction to restrain the Board from stopping the supply of the Croton water to a building owned by the plaintiff, which is used as a cheap lodging-house. The question involved turned upon the character of the building, and the mode in which it was used; the facts respecting which are stated in the opinion of the court.

DALY, F. J. * * *

The ordinance of the city corporation, establishing the rate of water rents, provides that hotels and boarding houses shall, in addition to the regular rate for private families, be charged for each lodging room, at the discretion of the Croton Aqueduct Board. The Board, upon the assumption that the plaintiff's building is a hotel, have imposed an additional tax of $180 annually. The plaintiff insists that it is not a hotel, and has re-

fused to pay the additional tax, in consequence of which the Board have notified him that they will, if it is not paid, cut off the Croton water from the building.

It appears that the building is a large structure of eight stories, each story consisting of lodging rooms, adapted to the use of one person only, and above the basement it is used exclusively as a lodging-house; that the rooms are very small, being from four to six feet wide and eight feet long; that they are intended for poor people, being let at the small rate of twenty-five cents per night, and the water used in each room does not exceed, upon an average, a pint a day, whereas the rooms in ordinary hotels are four times as large, can be occupied by four times as many persons, and the water used in such rooms is ten times greater; that there is not a sufficient supply of Croton water above the first floor; that four-fifths of the time it does not rise above that floor, that between seven o'clock in the morning and six in the evening there is no supply above the basement, and it could not be obtained between these hours for the use of the floors above, unless it was carried up from the floor below, at a great expenditure of time and labor; that the water for the supply of the rooms and for cleaning and ordinary use, above the second floor, is supplied by a huge tank, which the plaintiff has caused to be erected at his own expense in the attic, into which the rain-water flows that falls upon the roof; that there is no cooking for guests, the house above the basement being adapted only for sleeping in, and not one-quarter as much water is used by each individual as would be used in a private house with the same number of people; that upon an average sixty-five out of the one hundred and eighty rooms are untenanted, and yet the rate imposed by the Board is for one hundred and eighty rooms; that there is no bar or place for drinking or entertainment attached to the premises or connected with its occupation; there is a restaurant and a barber's shop in the basement, but each of them pays separately for the supply of Croton water which it receives.

This being the character of the building and of the uses to which it is applied, the question presented and the only one discussed upon the motion, is whether it is a "hotel"; a question the solution of which depends upon the meaning of that term.

Ordinarily, in a legal inquiry, it is sufficient to refer to some approved lexicographer to ascertain the precise meaning of a word. But this is a word of wide application, and as the meaning which is to be attached to it in this country, has been the subject of much discussion upon the argument, it may be well to refer to its origin and past history, as one of the means of determining its exact signification. The word is of French origin, being derived from hostel, and more recently from the Latin word hospes, a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another, as well as the master of a house who entertains travelers or guests. Among the Romans it was a universal custom for the wealthier classes to extend the hospitality of their house, not only to their friends and connections when they came to a city, but to respectable travelers generally. They had inns, but they were kept by slaves, and were places of resort for the lower orders, or for the accommodation of such travelers as were not in a condition to claim the hospitality of the better classes. On either side of the spacious mansions of the wealthy patricians were smaller apartments, known as the hospitium, or place for the entertainment of strangers, and the word hospes was a term to designate the owner of such a mansion, as well as the guest whom he received. (Andrew's Lex.) This custom of the Romans prevailed in the earlier part of the middle ages. From the fifth to the ninth century traveling was difficult and dangerous. There was little security except within castles or walled towns. The principal roads had been destroyed by centuries of continuous war, and such thoroughfares as existed were infested by roving bands, who lived exclusively by plunder.

In such a state of things there could be little traveling, and consequently the few inns to be found were rather dens to which robbers resorted to carouse and divide their spoils than places for the entertainment of travelers. (Histoire des Hotelleries, Cabarets, &c., par Michel et Fournier, Paris, 1851, p. 181.) The effect of a condition of society like this was to make hospitality not only a social virtue but a religious duty, and in the monasteries, and in all the great religious establishments, provision was made for the gratuitous entertainment of wayfarers and travelers. Either a separate building, or an apart-

ment within the monastery, was devoted exclusively to this purpose, which was in charge of an officer called the hostler, who received the traveler and conducted him to this apartment, which was fitted up with beds, where he was allowed to tarry for two days, and to have his meals in the refectory, while, if he journeyed upon horseback, provender was provided by the hostler for his beast in the stables. (Fosbroke's Monachism, 238, 3d ed.; Davies 2, 769.) In many countries this apartment or guest hall of a monastery retained the original Latin name of hospitium, but in France the word was blended with hospes and changed into hospice, and it afterwards underwent another change. As civilization advanced and the nobility of France deserted their strong castles for spacious and costly residences in the towns, they erected their mansions upon a scale sufficiently extensive to enable them to discharge this great duty of hospitality, as is still the custom among the nobility and wealthier classes in Russia, and in some of the northern countries of Europe. Borrowing, by analogy, from an existing word and to distinguish it from the guest house of the monastery, every such great house or mansion was called a hostel, and by the mutation and attrition to which these words are subject in use the "s" was gradually dropped from the word, and it became hotel. As traveling and intercourse increased, the duty upon the nobility of entertaining respectable strangers became too onerous a burden, and establishments in which this class of persons could be entertained by paying for their accommodation sprung up in the cities, towns, and upon the leading public roads, which, to distinguish them from the great mansions or hotels of the wealthy, and at the same time to denote that they were superior to the auberge or cabaret, were called hotelleries, a name which has been in use in France for several centuries, and is still in use to some extent as a common term for inns of the better class, while the word hotel in France has long ceased to be confined to its original signification, and has become a word of a most extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction, or of celebrity. It is applied to a hospital, or hotel dieu, or to a town hall or hotel de ville, to the residence of a judge, to certain public offices, and to any house in which furnished apartments are let by the day, week or month. (Roquefort, Etymologique Francais, Paris.

1829; Dictionnaire de l'Academie Francais, 1798, et Complement au Dictionnaire; Bescherelle, Dictionnaire Francais.)

The word, though so long in use in France, is of comparatively recent introduction into the English language. The Saxon word inn, was employed to denote a house where strangers or guests were entertained, down to the time of the Norman invasion, and under the Norman rule it was, in the popular tongue, the word for the town houses in which great men resided when they were in attendance on court; several of which became afterwards legal colleges, under the well known titles of inns of court. (Pearce, 50.) In all legal proceedings, however, and wherever the Norman French was spoken, the word hostel was the term for all such establishments. The places where entertainment could be procured for a compensation, to distinguish them from the inns, or great houses, where it was furnished gratuitously, were called in English common inns; while in Norman French, by a change analogous to that which had occurred in France, they were called first hostelleries, and afterward hostries. (Year Books, 42 E. iii., 11; 22 H. vi., 38; Statutes, 5 E. iii., c. xi.; Fitzherbert's Abm., p. 2, 28; Brooke's Abm., p. 4, 15; Dyer, R., 158, a note; Godb. R., 347; Kelham's Norman Dicty.; Law French Dicty., 1701.) To "host," was to put up at an inn; and "hostler," before referred to as the title of the officer in the monastery who was charged with the entertainment of guests, was the Norman word for inn-keeper, and was in use until about the time of Elizabeth, when, the keeping of horses at livery becoming a distinct occupation, it was the term for the keeper of a livery stable (Yelv. R., 67; Cooke's Entr. 347) and afterwards of the groom who has charge of the stables of an inn. (Calye's case. 8 Co. 32; Bailey's Dictionary.)

It appears from a note of Malone, referred to in Todd's edition of Johnson's Dictionary, that the word hotel came into use in England by the general introduction in London, after 1760, of the kind of establishment that was then common in Paris called an hotel garni, a large house, in which furnished apartments were let by the day, week or month. In Barclay's Dictionary, 1782; in the first edition of Walker, 1897, and in Sheridan's Dictionary, 1795, hotel is given as the proper pronunciation of hostel, an inn; and in the dictionary of Jones, 1798, and of Perry, 1805, it is incorporated as an English word, and is defined in

the latter to be "an inn, having elegant lodgings and accommodations for gentlemen and genteel families." Todd, 1814, defines it to be "a lodging-house for the accommodation of occasional lodgers, who are supplied with apartments hired by the night or week." The definition given by Knowles, 1835, is simply "a lodging-house." By Smart, 1836, "a lodging-house or inn." Beid, 1845, "an inn or a lodging-house." Boag, 1848, "an inn"; and by Dr. Latham, in his edition of Johnson's Dictionary, "an inn of a superior kind."

The word was introduced into this country about 1797. Before that time houses for the entertainment of travelers in this city were at first called inns, and afterwards taverns and coffee-houses. In 1794 an association organized upon the principle of a tontine, erected in Wall street what was then a very superior house for the accommodation of travelers, called the Tontine Coffee-house; the success of which led to the formation of another company for the erection of one upon a still more extensive scale in Broadway. This structure, which was called the Tontine Tavern, was built about 1796, upon the site of what had been a famous tavern or coffee-house in colonial times, and from the extensive accommodation it afforded and the superior character of its appointments, it was then, and for many years afterward, the most celebrated establishment of the kind in the country. There was at that period a rage for everything French. The city was filled with refugees from France and from the French West India possessions, whose residence among us produced a great change in our social habits, amusements and tastes (Watson's Annals, 209), while a fierce party strife prevailed between those who advocated the principles of the French Revolution and those who condemned them. The French national airs were sung in the streets, men mounted the tri-color cockade, and the proprietors of the new tavern, falling in with the popular current, gave a French name to their establishment, by changing it from the Tontine Tavern to the City Hotel. The new word was afterward adopted by the proprietors of other houses for the entertainment of travelers in this and neighboring cities, and becoming general, found its way into American dictionaries. Allison, one of the earliest of American lexicographers, 1813, defines it to be "an inn of high grade, a respectable tavern." Webster calls it "a house for entertaining strangers

or travelers," and says that "it was formerly a house for general strangers or lodgers," but that "the name is now (1840) given to any inn." Worcester's definition (1846) is "a superior lodging-house with the accommodations of an inn; a public house; a genteel inn; an inn," and in the last edition of Webster, 1864, there is given an addition to the previous general definition: "An inn; a public house, especially one of some style or pretensions."

It is to be deduced from the origin and history of the word and the exposition that has been given of it by English and American lexicographers that a hotel, in this country, is what in France was known as an hotellerie, and in England as a common inn of that superior class usually found in cities and large towns. A common inn is defined by Bacon to be a house for the entertainment of travelers and passengers, in which lodging and necessaries are provided for them and for their horses and attendants. (Bac., Abm., Inns., B.) In Thompson v. Lacy (3 B. and A., 283), Justice Bayley declares it to be "a home where a traveler is furnished with everything which he has occasion for while upon his way," and in the same case, Best, J., says it is "a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." But a more practical idea of what was understood at the common law as common inns, may be gathered from Hollingshed's description of them, as they existed in the days of Elizabeth. "Every man," says that quaint chronicler, "may in England use his inn as his own house, and have for his monie how great or how little varietie of vittals and whatsoever service himself shall think fit to call for. If the traveler have a horse, his bed doth cost him nothing, but if he go on foot, he is sure to pay a pennie for the same. Each comer is sure to be in clean sheets wherein no man hath been lodged since they came from the laundress or out of the water wherein they were washed. Whether he be horseman or footman, if his chamber be once appointed, he may carry the key with him as of his own house as long as he lodgeth there. In all our inns we have plenty of ale, biere, and sundrie kinds of wine; and such is the capacity of some of them that they are able to lodge two hundred or three hundred persons and

their horses at ease, and with very short warning (to) make such provision for their diet as to him that is unacquainted with-all may seem to be incredible." (Hollingshed's Chronicle—Description of England.) And another observer (Fynes Moryson), writing before 1614, adds: "If the traveler eats with the host or at the common table his meals cost him sixpence, and in some places fourpence; but if he will eat in his chamber he commands what meat he will, and the kitchen is open to him to order the meat to be dressed as he likes best." (The Itinerary, pp. 111-151.)

In the above-mentioned case of Thompson v. Lacy, the defendant kept a house in London, called the Globe Tavern and Coffee-house, where he furnished beds and provisions to those who applied. No stage coaches or wagons stopped there, nor were there any stables belonging to the house. The question was whether this was an inn, and it was held that it was. "The defendant does not charge," said Best, J., "as a mere lodging-house keeper by the week or month. * * * A lodging-house keeper, on the other hand, must make a contract with every man that comes, whereas an inn-keeper is bound, without any special contract, to provide lodging and entertainment for all at a reasonable price." In Doe v. Lansing (4 Camp. 76), decided before the above, Lord Ellenborough held that a coffee-house in London, where persons from the country lodged, was not an inn; and in an earlier case (Parkhurst v. Foster, 1 Salk. 387), it was held that an establishment at a watering-place, where persons were taken to lodge, in which dressed meat was furnished to them at fourpence per joint, and small beer at twopence per mug, and to whom stables were let to their horses, was not an inn. Neither of the cases is fully reported, and if maintainable, it must be upon the ground that these were not houses for the general reception of travelers, but places where either a lodging or certain articles of food, or the stabling of a horse, could be procured by paying for each in contradistinction to the general entertainment which an inn supplied to all travelers or guests at a reasonable charge. In Dausey v. Richardson (2 Ellis & Bl., 144), it was held that a boarding-house was not an inn, the distinction being put upon the ground that a boarder being received into a house is owing purely to a voluntary contract, whereas an innkeeper, in the absence of any reasonable or lawful

excuse, is bound to receive the guest when he presents himself. "The innkeeper," said Coleridge, J., in The King v. Ivens (7 C. & P. 213), "is not to select his guests. He has no right to say to one you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received;" innkeepers, he said, being a kind of public servants, having the privilege of entertaining travelers and of supplying them with what they want. In Seward v. Seymour (Anthon's Law Student, 51), it was held that a well-known establishment which formerly existed in this city, called the Atlantic Hotel, had a double character, being both a boarding-house and an inn; that in respect to those who occupied rooms and were entertained under precise contracts, it was a boarding-house, while with respect to transient persons, who, without any stipulated contract, remained from day to day, it was an inn; and this definition of an inn was substantially given by Chief Justice Oakley in Wintermute v. Clarke (5 Sandf. 247), as a house "where all who come are received as guests, without any previous agreement as to the duration of their stay, or as to the terms of their entertainment." In Willard v. Reinhard (2 E. D. Smith, 148), the distinction between a boarding-house and an inn was declared to be this: in a boarding-house the guest is under an express contract at a certain rate for a certain period of time, but in an inn there is no express engagement, the guest being on his way entertained from day to day, according to his business, upon an implied contract. And in Carpenter v. Taylor (1 Hilt., 195), it was held that a restaurant, to which a person resorts for the temporary purpose of obtaining a meal, is not an inn. "On the contrary," said Ingraham, J., "as the customs of society change and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes. Mere eating-houses cannot now be considered as inns. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers, and though the defendant may carry on in another part of his premises the business of an innkeeper, it does not follow that the liability for that part of the premises is to be extended to the whole. To which it may be added, with equal force, that a mere lodging-house, in which

no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn.

It follows from these authorities, that an inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. This, as accurately as I am able to state it, is the legal definition of an inn, and this is exactly what is understood in this country by a hotel. It is customary, especially in our cities, to let out furnished apartments in houses, by the week or by the month, without meals, or with breakfast simply; but we do not, as the French do, call such houses hotels, but merely lodging-houses. (Worcester's and Webster's Dictionaries.) We have in the cities houses of entertainment in which the guest or traveler pays so much per day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it. Where the restaurant forms a part of the establishment, and the house is kept under one general management for the reception of all travelers or guests that may come, it is an inn, there being no material difference between it and the Elizabethan inn, in which the traveler paid separately for his apartment and for each meal. It differs from a boarding-house, for the reason that all who come are received, and because the guest engages for no specific period, but pays only for the time he is there.

In Smith v. Scott (9 Bing. 14; 2 Moo. & S. 35), it was held that a woman who kept a house without any public sign, in London, in which she let rooms to families or single men for long or short periods, and, if required, found cooked provisions for them, upon which she charged a small profit, receiving her orders usually every Monday and her payment at the end of the week—the house being open at all hours to any person who came—was a hotel-keeper, within the meaning of the Bankrupt Act of 6 Geo. IV., ch. 16, § 2, which enumerates "victuallers, keepers of inns, taverns, hotels and coffee-houses," as among the classes of persons who may be declared bankrupt. C. J.

Tindall put the decision upon the ground that some distinction must have been intended as the word which immediately preceded hotel in the act is inn, and that it could scarcely have been intended to designate the same thing by both words. He was of opinion that hotel was not used in the sense of the old word hostel, "for that," he said, "means what is now termed an inn." "The modern word," he remarked, "was introduced from the French, and rather implies a house to which people resort for lodging than for the sort of entertainment which is to be procured only at an inn"; and Gaselee, J., said that there might have been doubt if the party had only received lodgers occasionally, but as the house was open to any comer, and all who frequented it were supplied with provisions to some extent, he regarded it as a hotel. It is sufficient to say in respect to this case that it may be that in London the word hotel is not applied to an inn; that there it has undergone no change, but still is limited to the signification which it originally had when introduced there. Such is not, however, the case in this country, where the word has been long in popular use to designate what in the law is denominated an inn.

I have discussed the meaning of this word closely, for the reason that it is an embarrassing question whether the building owned by the plaintiff is, or is not, a hotel. As contradistinguished from a boarding-house, it is public in its character, being open to all comers, and two of the principal wants supplied by an inn, lodging and meals, can be obtained there; but not under any general arrangement, as the restaurant is kept by one person and the lodging-house by another. The proprietor of the restaurant does not engage to provide lodgings for those who come to his restaurant for entertainment, and the keeper of the lodging-house lets out his rooms for twenty-five cents a night without any stipulation, express or implied, to furnish those who take them meals. Each is independent of and has no control over the other, and neither in his separate capacity could be regarded as the keeper of an inn, liable to that extraordinary responsibility for the safe keeping of the property of guests which the law imposes upon that class of bailees. If the cases to which I have reference (Parkhurst v. Lansing, 1 Salk, 387, and Doe v. Lansing, 4 Camp, 76), were correctly determined, it is not an inn, and in the best view I can take of it, though the point is

not free from doubt, it is not that kind of house for the general reception of travelers which in this country is known as a hotel.

But though the uses to which the building is applied may not, in the legal or in the popular acceptation of the term, make it a hotel, it might be deemed one in the sense of an ordinance regulating the rate to be paid for the supply of Croton water, if it were apparent that it was a kind of establishment for which the ordinance manifestly meant to provide. While, therefore, I am disposed to think that a large lodging-house, to which water is freely supplied, would come within the intention of the ordinance, I am of the opinion that the plaintiff's building does not. It is not strictly within the words of the ordinance, as it is not what is popularly known as a hotel, and it is not such an establishment as could have been contemplated by it, as it is not to be supposed that there was an intention to tax a man for all the lodging-rooms of a building if water could not be supplied to them, and he is compelled to obtain it elsewhere. It is a case, in my judgment, coming under the portion of the ordinance which provides that matters not mentioned are to be arranged by a special contract, and not under the one which imposes a charge upon each lodging-room. I shall, therefore, grant the injunction.

JOHNSON v. CHADBOURN FINANCE CO., 89 Minn. 310; 94 N. W. 874.

(1903)

Action in the district court for Hennepin county to recover $1335 for the loss of wearing apparel and ornaments, destroyed by fire while plaintiff was a guest at the "Hotel Vendome" owned by defendant. Verdict for defendant. Appeal by plaintiff from an order denying a motion for judgment notwithstanding the verdict or for a new trial.

COLLINS, J. * * * The establishment did not come within the definition sometimes given to the term "Hotel" or "Inn," and yet it answered the description of Petersdorf, who, in his Abridgment, says that an inn is a house for the reception and entertainment of all comers for gain. That the Vendome received

and entertained all comers, to the extent of supplying them with rooms, for compensation, is not disputed. Justice Best describes an inn as a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a state in which they are fit to be received. Other writers have defined an inn as a house where a traveler is furnished with everything he has occasion for while on his way, and that in an inn there must be provision for the essential needs of a traveler upon his journey—lodging as well as food. An inn has often been defined as a place for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. There is no doubt that circumstances and changes in modes of life and innovations in methods of traveling have very much affected and qualified the character of hotels and inns, and consequently the definitions thereof, of fifty years ago. At that time an inn was a house where the entertainment was for both man and beast—for one quite as much as for the other. In these days very few people travel with horses, and the old hostelries have almost entirely disappeared. Few hotel-keepers in the state, in places of any size, have barns of their own in connection with their hotels.

With these changes in the ways of the traveling public, and innovations in hotel-keeping, the definitions which have heretofore prevailed must also be changed and modified. In many cities all of the first-class places for entertainment of travelers are conducted upon the European plan solely—the rooms being furnished and rented, and the guests permitted to dine where they please—or are kept upon both European and American plans. Usually there is a cafe owned and operated by the hotel proprietor, but, as stated, in this particular instance there was none. Just what should be held if a case presented itself where there was no cafe or restaurant in connection with such an establishment, we are not prepared to say; but here there was a cafe in the building—access thereto being afforded from the office and sleeping apartments without going out of doors—and it was shown by the testimony that on the letter heads furnished by the defendant to the guests of its house it was stated that there was a "first-class cafe in connection; popular prices." And it was

not disputed that the Regan Bros.' cafe was referred to in this advertisement. The building itself was a hotel, according to large signs upon the outside thereof—three or more in number—announcing it as the "Hotel Vendome" and as an "European Hotel." It also appeared from the proofs that the defendant had availed itself of the innkeepers' law (G. S. 1894, 7997, et seq.), by posting notices in each room, whereby the proprietor attempted to restrict its liability to the occupants of the rooms in case of loss of property. If the establishment was not a hotel or inn, it was masquerading as one; and we are of opinion that its proprietor would have promptly resented a charge made, before the fire, that it was nothing but a lodging house.

Upon the ground of public policy, we think it must be held that where the proprietor of such an establishment as this was advertises and represents to his guests that he is keeping a hotel or inn—a public place for the entertainment of transient guests—by means of signs on the outside of the building, posts notices in the rooms as an innkeeper, and advertises and represents that there is a cafe in connection with his sleeping apartments, thus representing to them that he furnishes not only rooms, but meals, he must be bound thereby, and cannot avoid his duties and responsibilities as a hotel or an innkeeper by simply showing that the cafe in the same building is owned and operated by other persons, and that he has no hand or voice in its management.

NELSON v. JOHNSON, 104 Minn. 440; 116 N. W. 828.

(1908)

START, C. J. The facts in this case, as found by the trial judge, are substantially these: The defendant, on and prior to November 16, 1907, was the keeper of a house for the entertainment of travelers and transient lodgers known as the "Bridge Square Hotel," in the city of Minneapolis. There were publicly displayed upon the front of the building the name "Bridge Square Hotel," and a sign advertising to the public that furnished rooms were there to let for a single night. There were thirty-six rooms so to let in the building, in which there was an office for the reception of guests seeking to hire rooms for the purpose of lodging therein. The defendant, in the due and

regular course of his business, let the rooms to such persons who were in fit condition to be received therein and who paid therefor certain stipulated prices, without special contract, for a single night, or such longer period as they might desire, and the persons so hiring the rooms customarily inscribed their names and addresses in a register kept in the office for that purpose. The defendant employed two clerks to have charge of the office and keep the same open for the reception of such guests at all hours of the day and night. There was not maintained at or in connection with the place any dining room or other place where food was customarily supplied to the lodgers, or to other persons besides the defendant and his family and employes. On the day named the plaintiff, who was then a traveler temporarily sojourning in the city, hired of one of defendant's clerks in the office, a room to be used by him for the purpose of lodging therein on the night of that day and following night, paying therefor the sum of fifty cents. At the time of such hiring he was invited to write his name in the register, and so did, and thereupon a room was assigned to his use, without examination thereof on his part or special contract therefor. While the plaintiff was so occupying the room, and during the night, there was stolen from his clothing therein $95, without negligence on the part of either him or the defendant.

Upon these facts the trial judge found as a conclusion of law that at the time of the loss of the money the defendant and plaintiff stood in the respective relations to each other of common innkeeper and guest, and that the plaintiff was entitled to judgment against the defendant for $95. Judgment was so entered, from which the defendant appealed.

The sole question for our decision is whether the facts found sustain the conclusions of law. It is the contention of the defendant that the facts found do not sustain the conclusions of law, because no provision was made in his house for serving meals to his guests. Therefore it was not an inn or hotel, but a mere lodging house, and the extraordinary liability of a common innkeeper was not imposed upon him. The plaintiff's loss was not due to any negligence on the part of the defendant; hence if he was not an innkeeper he is not liable for the loss,

but if he was he is so liable. The question, then, in its last analysis, is: Was the defendant's house a hotel or inn?

There is no substantial difference, as to the rights and liabilities of the keepers thereof, between an inn and a hotel; for in this country the legal definition of each is practically the same. If the defendant had furnished his guests with food, his house would have been, without question, an inn, within the present legal meaning of that term. In early days and under primitive conditions it was necessary, in order to bring a place within the legal definition of an inn, and to charge the keeper thereof with liability as such, that lodging, food, drink, and stabling should be furnished to travelers. But as cities grew, and modes of living, travel, and transportation of persons changed, the legal definition of an inn was modified thereby, and a bar to supply guests with drink and a stable for the care of their horses are now no longer essential requisites of an inn. Why, then, should a dining room, or a cafe or a restaurant, to supply guests with food, be now held an essential requisite of an inn or hotel? The reason for holding that the supplying of guests with food is a necessary requisite of an inn has as effectually ceased as it has with reference to the supplying of drink and stabling. On the other hand, the reason for imposing the liability of a common innkeeper upon a hotel-keeper who furnishes lodgings only is still just as potent as it ever was for imposing it in any case. Therefore the justice and necessity of enforcing the liability against the proprietor of a house at which no meals are served, but which he holds out to the public as a hotel, and not as a private lodging house, are just as imperative as they would be if meals were served therein.

The reasons for this conclusion cannot be better stated than they were by the learned trial judge in his able and helpful memorandum: "It seems to me impossible to suggest any reason why, upon principle, the extreme degree of liability should or should not be imposed upon the keeper of a place where the traveling public are offered lodgings, according as he does or does not furnish meals for his lodgers. * * * The need for protection to the traveler's property is incident to his lodging, and not to his eating. It is while he is asleep in his bed, and his personal belongings are unguarded by his own watchfulness, that for the security of his property he needs to invoke the

most stringent rules of the law of bailment. Especially in large cities does he need this protection. The exigencies of travel bring him often to unfamiliar places, and at hours and under conditions when investigation is impracticable. He must go for bed and shelter to the place which he finds open for his accommodation, trust himself and his property to a stranger, and accept, practically without opportunity for selection, the quarters assigned to him. The rush and turmoil of the city afford to the thief his most attractive field of operation, and the stranger more than others is exposed to his depredations. * * * These considerations lead to the conclusion that the necessities of modern life demand that the extreme degree of responsibility for the property of the guest be applied to the keeper of a place of entertainment for travelers according to the essential features of the relation, and not in fixed adherence to old definitions, or according to the name by which the place is known—whether 'Inn,' 'Hotel,' or 'Lodging House.'"

It is, however, stated in many of the text-books and encyclopædias that a place which does not furnish the traveler with both lodging and food is not an inn. Nearly all of the adjudged cases cited in support of this proposition rely upon the very interesting opinion of Judge Daly in the case of Cromwell v. Stephens, 2 Daly, 15, in which it is stated that a mere lodging house, in which no provision is made for supplying lodgers with their meals, wants one of the essential requisites of an inn. The question at issue in that case was, not whether the proprietor of the house was liable to his guests as a keeper of a common inn, but whether the house was a hotel within the meaning of an ordinance fixing water rates for hotels. An examination of the cases cited in that opinion raises a grave doubt whether facilities for furnishing guests with meals was, even at the time the decision was made, an essential requisite of a hotel. However this may be, the question is an open one. Mr. Schouler says: "Whether the utter omission to provide a place for meals on the premises is enough to take a house for transient lodgers out of the legal fellowship of inns, is not clearly determined." Schouler, Bail. sec. 278.

The question here under consideration was before this court in the case of Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. 571, but was not directly decided, for

the reason that there was a restaurant connected with the hotel in question in that case, although it was not owned or controlled by the proprietor of the hotel. The logic of that case, however, leads directly to the conclusion that supplying guests with meals is not now one of the essential requisites of a hotel, in order to charge the proprietor thereof with the liability of a keeper of a common inn; and we so hold.

There is a clear distinction between a mere private lodging house and a hotel where no meals are served. Such a hotel or inn is a house the proprietor of which "holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." The keeper of such a house is bound, without making any special contract therefor, to provide for all, to the limit of his facilities, at a reasonable price; but the proprietor of a private lodging house is not bound to receive all who apply, but he has the right to select his guests, contracting specially with each. The facts found in this case clearly justify the conclusion of law that the defendant was liable as the keeper of an inn or hotel.

Judgment affirmed.[1]

[1] "The whole system of travel and communication in rural England, at the time the law of inns was in the making, required, as has been seen, that the weary traveler should find at convenient places beside the highway houses of entertainment and shelter to which he might resort during his journey for food, rest and protection. The ordinary laws of supply and demand would lead to the establishment of such houses by the roadside at places which would sufficiently serve the public convenience; but those laws could not be trusted to secure to each individual the benefit of the food and shelter therein provided. The desire for gain is not the only passion which moves men, innkeepers or others. Hatred, prejudice, envy, sloth or undue fastidiousness might influence an innkeeper to refuse entertainment to a traveler, even though he could pay his score. The supply of food and shelter to a traveler was a matter of public concern, and the house which offered such food and shelter was engaged in a public service. The law must make injustice to the individual traveler impossible; the caprice of the host could not be permitted to leave a subject of the king hungry and shelterless. In a matter of such importance the public had an interest, and must see that, so far as was consistent with justice to the innkeeper, his inn was carried on for the benefit of the whole public; and so it became in an exact sense a public house. * * * He is a 'common innkeeper,' who, in the quaint language of Lord Holt, 'has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade.' Whether a man is an innkeeper depends, therefore, in the first place upon whether he makes a profession of serving the

2. Obligations of Innkeepers.

a. Obligation to receive all transients.

LUSK v. BELOTE, 22 Minn. 468.

(1876)

Appeal by defendant from an order of the district court for Ramsey county, Wilkin, J., presiding, refusing a new trial.

Berry, J. In August, September and October, 1872, the defendant was keeping "The Park Place Hotel," a public inn and boarding house, in the city of St. Paul. On September 20, 1872, the plaintiff, his wife and four children being inmates of the hotel, a gold watch belonging to plaintiff, and certain articles of jewelry belonging to two of the children mentioned, were stolen from the rooms occupied by the plaintiff and his family. The jewelry consisted of "ordinary articles of wearing apparel and ornaments" of the plaintiff's two children, to whom the same belonged, and was brought to the hotel when they came there. The plaintiff's wife and six children became inmates of the hotel on August 7, 1872, and (with the exception of two children who left a few days before the theft) remained there until some time in October following. The plaintiff was not a resident of this state, but at the time when they came to the hotel his wife and children were living, and for three or four years previous had been living, in St. Paul, sometimes keeping

public needs; whether his regular business is entertaining travelers." Beale, Innkeepers. Sec. 11, 12.

"The profession of readiness to serve the public need not be made in any particular way; it is enough that by word or act the innkeeper makes public his intention to become such. It has been usual, particularly in former times, to advertise his house by hanging out a sign; but it is not essential to a man's being an innkeeper that he should do so. If he in fact carries on the business publicly as innkeeper he will be held as such, although he never displayed a sign. The profession may be made by any method of soliciting the patronage of the public: as by advertising, by keeping a public register, and by running a coach to a railroad station." Beale, Innkeepers, Sec. 19.

"A townsman or neighbor may be a traveler and therefore a guest at an inn as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, anyone away from home, receiving accommodations at an inn as a traveler, is a guest." Walling v. Potter, 35 Conn. 183. (1868).

house and sometimes staying at a hotel or boarding-house, the plaintiff being in the habit of making them an occasional visit as often as two or three time a year. The plaintiff arrived at St. Paul and became an inmate of the hotel about September 10, 1872, and remained about four weeks.

An innkeeper is by the common law responsible for the loss, in his inn, of the goods of a traveler who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy. 2 Kent, 592-597; Shaw v. Berry, 31 Me. 478; Sibley v. Aldrich, 33 N. H. 553; Hulett v. Swift, 33 N. Y. 571; Wilkins v. Earle, 44 N. Y. 172; 1 Chit. Cont. (11th Am. ed.) 674-677, and notes. But this strict liability exists only in favor of travelers. As the articles of jewelry stolen belonged to the plaintiff's children, being their "ordinary articles of wearing apparel and ornaments," and were brought to the defendant's inn when such children came there and became inmates thereof, the liability of defendant, as respects their loss, must depend upon the status of the persons to whom the same belonged.

Considering the length of time during which, and the manner in which, they had been living in St. Paul before they became inmates of the defendant's inn, they must be regarded as, in fact, dwellers in and inhabitants of St. Paul. There is no reason why they may not properly be so regarded, although their domicile was, in law, in another state. They were certainly not travelers in any just sense of the word, for persons who have dwelt in a city no larger than St. Paul do not become travelers by changing their dwelling place from one part of it to another. It is manifest, therefore, that, as respects the jewelry stolen, the verdict cannot be sustained; for, upon the evidence, it is obviously based upon the defendant's supposed liability for the loss of the same under the rule above mentioned—a rule, as we have seen, applicable only as between an innkeeper and a traveler.

In reference to the plaintiff, it appears that he was not a resident of this state, and that he came to defendant's inn from some place without this state upon a visit to his family. There is no room, upon the evidence, to doubt that he came to defendant's inn, and was received there, as a traveler, and in no other character. His purpose evidently was to make a flying visit

to his family, and a merely temporary stay in St. Paul, where he remained about a month only. Under such circumstances, unless something appears affirmatively to the contrary, his status as a traveler, like any other status, once shown to exist, is to be presumed to have continued. Neither the agreement by which he was to pay special rates for himself and family, lower than those ordinarily charged for transient guests, nor the fact that he remained in the inn for a month, nor, so far as we discover, any other fact which appeared in the case, furnishes any evidence that his character has changed from that of a traveler to that of boarder. Jalie v. Cardinal, 35 Wis. 118, and cases cited. There was, therefore, no error in the instruction given to the jury to this effect. As respects, then, the plaintiff's watch, we see no reason why the evidence was not sufficient to charge defendant for its loss.

These are all the points which we deem it necessary to consider. For the insufficiency of the evidence in the case to sustain the verdict as respects the jewelry stolen, irrespective of other grounds, the defendant's motion to set aside the verdict and for a new trial should have been granted by the court below. As, however, upon the evidence, the plaintiff would appear to be entitled to recover for the watch, and the testimony proving its value at $200.00 is not affected by any testimony to the contrary, the plaintiff may within twenty days from notice of the filing of this opinion, remit all of the verdict except $200.00, and take judgment in the court below upon the verdict so reduced; otherwise, the order denying the motion to set aside the verdict and for a new trial is reversed.

THE QUEEN v. RYMER, L. R. 2 Q. B. D. 136.

(1877)

The defendant was tried at the Michaelmas sessions for the western division of the county of Sussex, for that he, being a licensed innkeeper, refused to supply the prosecutor with refreshments. There were several counts in the indictment varying the charge, some describing the prosecutor as a traveller, and others not, but otherwise nothing turned upon the form of the indictment.

The defendant was the proprietor of the Sea House Hotel at Worthing, attached to which, and under the same roof and license, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about ten feet wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel and serving from behind the counter.

The prosecutor, who was a householder living in the same town, within twelve hundred yards of the defendant, had been in the habit of coming to the premises of the defendant accompanied by two dogs. He had formerly three. One of the two was a savage dog, and generally wore a muzzle; the other of the two was a quiet animal. They were very large, of the St. Bernard mastiff breed.

The vice-chairman declined to stop the case, which ultimately went to the jury. He told them that prima facie the defendant was bound by the law to supply the prosecutor, as one of the public, with refreshment upon his reasonable demand, that he could not select his customers, or reject any from caprice or dislike; but that if the prosecutor insisted (as he did) upon being accompanied by his dog, which from its size, breed, nature, or habits was obnoxious to his customers, and a nuisance in his business, he was justified (particularly after notice) in refusing to admit or serve the prosecutor.

The jury found the defendant guilty, and, in answer to the vice-chairman, said they considered the defendant was bound to serve the prosecutor, though accompanied by any dog, even a savage one; but they found, as a fact, that the dog in question was not a savage one.

The defendant was bound over on his own recognizance in £50 to appear to receive judgment when called upon.

If the Court should be of opinion that the conviction was right, it was to stand, otherwise to be quashed.

Jan. 25. No counsel appeared.

KELLY, C. B. In this case, if there were any reasonable ground for doubt, we should regret that the case has not been argued by counsel. But fortunately, though the case is of impor-

tance, it presents no difficulty whatever. The indictment charges the defendant that, being an innkeeper, and under the obligation to receive the prosecutor in his inn, he refused to do so without having any reasonable cause or excuse for such refusal.

It was contended on the part of the prosecutor that, by refusing to provide him with refreshments, the defendant had committed an indictable offense. On the other hand it was urged on the part of the defendant, first, that the prosecutor was a local resident and not a traveler, and therefore there was no obligation on the part of the defendant to serve him, and, secondly, that, at all events the defendant was justified under the foregoing circumstances in refusing to do so.

As to the first question, whether the place in question was an inn, we must look at the facts. The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate entrance, and appears to have been a mere shop in which spirits are retailed across a counter. The letters, too, make it plain that this was the place to which admission was claimed by the prosecutor. Such a place is not an inn within the meaning of the common-law rule. An inn is a place "instituted for passengers and wayfaring men." Calye's Case. A tavern is not within the definition. In such a place as this no one has a right to insist on being received any more than in any other shop. Therefore, on this ground, even if it stood alone, this conviction must be quashed.

The second question is, whether the prosecutor was a traveler. I need hardly cite authorities to show that it is essential to such a prosecution that the prosecutor should be a traveler. If any be wanted, the case of Rex v. Llewellyn, in which an indictment was held bad for want of an allegation to that effect, is an express authority upon the point. Here the prosecutor was not a traveler in any sense whatever.

Thirdly, even if both the foregoing questions had been answered otherwise, I think it clear that the defendant had reasonable cause for refusing to receive the prosecutor. I do not lay down positively that under no circumstances could a guest have a right to bring a dog into an inn. There may

possibly be circumstances in which, if a person came to an inn with a dog, and the innkeeper refused to put up the dog in any stable or outhouse, and there were nothing that could make the dog a cause of alarm or annoyance to others, the guest might be justified in bringing the dog into the inn. But it is not necessary to decide any such question. In this case, looking at the previous facts, the number of dogs previously brought, and their kind and behavior, the nature of the right claimed by the prosecutor in his letter, and the size and class of the dog, I think the defendant would have had ample ground for his refusal even if the place had been an inn and the prosecutor a traveler.

DENMAN, J. I am of the same opinion upon all points. The principles laid down in Burgess v. Clements show that the object of the law upon the subject of an innkeeper's liability, is merely to secure that travelers shall not, while upon their journeys, be deprived of necessary food and lodging. With reference to the question of reasonable excuse, the finding of the jury does not affect the matter. I assume that, upon this part of the case, the proper question was left to them, namely whether the defendant had reasonable cause for his refusal; and they have not found that he had not, nor is there any evidence to support such a finding. They have found what amounts to an erroneous statement of law.

FIELD, J., and HUDDLESTON, B., concurred.

MANISTY, J. I agree upon all points. I only wish to add that, in my opinion, a guest cannot, under any circumstances, insist on bringing a dog into any room or place in an inn where other guests are.

Conviction quashed.

WILLIS v. McMAHON ET AL., 89 Cal. 156.

(1891)

TEMPLE, C. Appeal from judgment and order denying defendants' motion for a new trial.

Action for damages for refusal to entertain plaintiff at defendants' hotel, thereby preventing him from receiving the benefit of Bartlett Springs water.

It appears that defendants were proprietors of Bartlett Springs, in Lake County, and of a hotel at the springs, for the accommodation of guests, who resorted there in great numbers for the water, which was the principal inducement for guests to visit the hotel.

The plaintiff was an invalid, and had on several occasions been entertained at the hotel and benefited by the water. On the ninth day of June, 1888, he again requested entertainment as a guest. There was room for his accommodation; he was a fit and proper person, and had ample means of payment.

The manager, one of the proprietors, being present, refused him entertainment, saying: "I'll teach you how to get up a petition to have me removed."

It is claimed here that the court erred in allowing plaintiff to testify that preventing him from using the water had a very injurious effect upon his health. Under the circumstances, however, this amounted to no more than the previous statement, that the water had benefited him; that he was an invalid, and had visited the springs hoping to be benefited again. The jury could not have been misled, for it could have had no other meaning. The complaint avers, and the evidence shows that the water was the principal inducement to visitors of the hotel, and was the sole inducement to plaintiff. Necessarily, to be deprived of it would be an injury, in his estimation.

Error is also claimed in the refusal to give defendants' fourth instruction, to the effect that defendants were not bound to furnish water of the spring. There was no evidence that they refused to allow plaintiff the use of it. His injury was in being refused entertainment at the hotel, and, in consequence, the use of the water.

We think the judgment and order should be affirmed.

BELCHER, C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.[1]

[1] "The fundamental duty of the innkeeper to the public, as a person engaged in a public employment, is to receive for entertainment in his inn all travelers who properly apply to be admitted as guests. (Willis v. McMahon, 89 Cal. 156, 26 Pac. 649 (1891); Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416 (1848); Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837); Adams v. Freeman, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327 (1815); Commonwealth v. Mitchell, 2 Parsons (Pa.) 431, 1 Phila. 63 (1850); Rex v. Ivens, 7 Car. &

P. (Eng.) 213 (1835); Hawthorne v. Hammond, 1 Car. & K. (Eng.) 404 (1844); Rex v. Collins, Palmer, 363, 373, 2 Rolle, 345 (Eng. 1623); Rex v. Smith, 65 J. P. 521 (Eng. 1901). Beale, Innkeepers. Sec. 61.

b. Obligation to provide adequate facilities:—"Not only must the innkeeper be willing to receive travelers as his guests, he must be prepared to shelter and entertain them. An innkeeper without a roof to cover the heads of his guests or without sufficient food to appease their hunger would be as little regardful of the public obligation under which he acts as the innkeeper who refused admittance to his inn to the weary traveler. It is apparent, therefore, that from the duty to receive necessarily follows the duty to provide adequate facilities. Such facilities include an inn in proper repair, and of sufficient size to supply the demand; sufficient stores of wholesome food and comfortable furniture; and a sufficient number of servants to perform the requirements of service and protection to the guest." Beale, Innkeepers. Sec. 54.

Not obliged to build larger.—Wyman Public Service Corporations. Sec. 269. Sec. 291.

c. Obligation to refrain from discrimination:—"It is clear that the innkeeper can perform his duty to the public only by refraining from discrimination in his treatment of guests. If he gives to one man better service in the line of his business than to another, or serves him at a lower price, he is to that extent fostering the interest of an individual against that of the whole public. Each traveler who applies for admittance to an inn does so as a representative of the public, into whose service the innkeeper has entered; and each person equally represents that public, and is equally entitled to all the service which the innkeeper owes. It is only when he steps outside his public calling and performs services not included in the business of innkeeping that he is entitled to act from motives of private interest or friendship."

"Equality of service does not mean identity of service; and if one guest gets service that is reasonably and substantially equivalent to that furnished to another guest, he cannot complain. Some difference is of course necessary. If all the guest chambers in an inn are properly equipped, no one can legally complain because the room assigned to another has more tasteful furniture, or a more attractive outlook from the window; nor can a guest object because he is not assigned to the same table in the dining room as another, or because a particular servant is assigned to another guest rather than to himself. An inn might doubtless consist of two separate buildings for guests; and if each was properly equipped, no guest could complain that he was assigned to one rather than to the other. While, therefore, an innkeeper could not legally discriminate between guests of different classes or different races he might separate them, putting each class or race into a separate but equally well-equipped building." * * * Beale, Innkeepers. Sec. 55, 56. See, also, Wyman, Public Service Corporations. Sec. 361, 565, 628, 632; Nelson v. Bolt, et al., 18 Fed. R. 779.

Right to assign room.—"It follows that the innkeeper, in the course of his management, has the absolute right to assign the guest to any proper chamber; (Fell v. Knight, 8 M. & W. 269, 10 L. J. Ex. 277, 5 Jur. 554 (Eng. 1841); Scrivenor v. Reed, 6 W. R. (Eng.) 603 (1857); Doyle v. Walker, 26 Up. Can. Q. B. 502 (1867), and having assigned a guest to one room, he may at will change the room, putting him into a different room, provided the latter furnishes reasonable accommodation. (Doyle v. Walker, 26 Up. Can. Q. B. 502 [1867]). The assignment of a guest to a room is in no sense a lease; it is a mere revocable license." Beale, Innkeepers. Sec. 167; Wyman, Public Service Corporations. Sec. 843, Sec. 845.

e. Diligence.

CALYE'S CASE, 8 Co. 32a.

(1584)

If the horse of a guest at an inn be stolen, the innkeeper is not liable if the horse were put to pasture at the guest's request; otherwise if the innkeeper had put the horse to grass of his own head.

If the goods of a neighbor, who lodges at the inn as a friend at the request of the innkeeper, be stolen, the innkeeper is not liable.

If a neighbor, who is no traveler, as a friend at the request of the innkeeper lodges there and his goods be stolen, etc., he shall not have an action.

An innkeeper is bound to answer for himself and for his family, for the chambers and stables; for they are infra hospitium.

It is no excuse for the innkeeper that he delivered the guest the key of the chamber in which he is lodged and that he left the chamber door open.

Although the guest does not deliver his goods to the innkeeper to keep, nor acquaints him with them, yet, if they be carried away or stolen, the innkeeper is liable.

If the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged.

The innkeeper requires his guest to put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not; the guest lets them lie in an outer court, where they are taken away; the innkeeper shall not be charged.

The innkeeper's liability extends to all movable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, etc.

If the guest be beaten in the inn, the innkeeper shall not answer for it. S. C. 4 Leon. 96.

d. Obligation to make reasonable charges:—"Another rule clearly following from the general principle that the innkeeper must receive all travelers as his guests is that he is limited to a reasonable compensation for his services; for if he could charge what he pleased, he could make anyone's right to be received valueless by requiring the payment by way of accommodation of a prohibitive amount." Beale, Innkeepers. Sec. 57.

It was resolved, per totam CURIAM this term, that if a man comes to a common inn and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it; for the words of the writ which lieth against the hostler are, Cum secundum legem et consuetud regni nostri Angliae hospitatores qui hospitia com' tenent ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo quidam malefactores quendam equum ipsius A. precii 40s. infra hospitium ejusdem, B. etc. inventum, pro defectu ipsius B. ceperunt, etc. Vide Registr' fol. 105. inter brevia de Transgr. and F. N. B. 94 a. b. by which original writ (which is in such case the ground of the common law) all the cases concerning hostlers may be decided. For, 1. It ought to be a common inn; for if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it; for the words are hospitatores qui com' hospitia tenent, etc. And so are the books in 22 H. 6. 21 b. 38; 2 H. 4 7 b; 11 H. 4. 45 a. b; 42 Ass. pl. 17; 42 E. 3. 11 a; 10 El. Dyer 266; 5 Mar. Dyer 158. And the writ need not mention that the defendant keeps commune hospitium, for (32 b) the words of the writ in the register are infra hospitium ejusdem, B. But it is to be so intended in the writ; for the recital of the writ is, hospitatores qui communia hospitia tenent, etc., and the one part ought to agree with the other, and the latter words depend on the other, and the plaintiff ought to declare that he keeps Commune Hospitium; and so the said books in 22 H. 6. 21, 11 H. 4. 45 a. b, 10 Eliz. Dyer 266, &c., are well reconciled.

2. The words are, ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes; by which it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is, diversorium, because he who lodges there is, quasi divertens se a via; and so diversoriolum. And therefore if a neighbor who is no traveler, as a friend, at the request of the innholder lodges

there and his goods are stolen, &c., he shall not have an action; for the writ is, ad hospitandos homines, etc., transeuntes in eisdem hospitantes, &c.

3. The words are, eorum bona et catalla infra hospitia illa existentia, &c. So that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are infra hospitium. And because the horse, which at the request of the owner is put to pasture, is not infra hospitium, for this reason the innholder is not bound by law to answer for him, if he be stolen out of the pasture; for the thing with which the hostler shall be charged ought to be infra hospitium; and therewith agree the books in 11 Hen. 4. 45 a. b., 22 Hen. 6. 21 b., 42 E. 3, 11 a. b., 42. Ass. pl. 17, where Knivet, C. J., saith that the innholder is bound to answer for himself and for his family, of the chambers and stables, for they are infra hospitium; and with this resolution in this point agreed the opinion of the Justices of Assize, (viz. the two Chief Justices, Wray and Anderson) in the county of Suffolk in Lent vacation, 26 Eliz. that if an innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him. But it was held by them, that if the owner doth not require it, but the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen, etc. And it is to be observed that this word hostler is derived ab hostile; and hospitator, which is used in writs for an innholder, is derived ab hospitio, and hospes et quasi hospitium petens.

4. The words are, ita quod defectu hospitator', seu servientium suorum, &c., hospitibus hujusmodi damn' non eveniat, &c., by which it appears that the innholder shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within his common inn; for the innkeeper is bound in law to keep them safe without any stealing or purloining; and it is no excuse for the innkeeper to say, that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety; and therewith agrees 22 H. 6. 21 b, 11 H. 4. 45 a. b, 42 Edw. 3 11a. And although the guest doth not deliver his goods to the innholder to keep, nor acquaints him

with them, yet if they be carried away, or stolen, the innkeeper shall be charged, and therewith agrees 42 Edw. 3. 11 a. And although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged. 22 H. 6. 38; 8. R. 2. Hosteler 7. Vide 22 H. 6. 21. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant; and the words of the writ are, pro defectu hospitator' seu servientium suorum. Vide 22 H. 6. 21 b. But if the innkeeper appoints one to lodge with him, he shall answer for him, as it there appears. The innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not; the guest lets them lie in an outer court, where they are taken away; the innkeeper shall not be charged, for the fault is in the guest, as it is held 10. Eliz. Dyer 266.

5. The words are, hospitibus damnum non eveniat; these words are general, and yet forasmuch as they depend on the precedent words they will produce two effects, viz.: 1. They illustrate the first words. 2. They are restrained by them: for the first words are, eorum bona et catal' infra hospitia illa existentia absque subtractione custodire, &c., which words (bona et catalla) by the said words, ita quod, &c., hospitibus damnum non eveniat, although they do not of their proper nature extend to charters and evidences concerning freehold or inheritance, or obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them great damages happen to the guest; and therefore, if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be bona et catalla generally; and the declaration shall be special.—2. These words, bona et catalla, restrain the latter words to extend only to movables; and, therefore, by the latter words, if the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his movables which he brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person; and yet in such case of battery,

hospiti damnum evenit, but that is restrained by the former words, as hath been said. And these words aforesaid, absque subtractione seu amissione, extend to all movable goods, although of them felony cannot be committed; for the words are not absque felonica captione, etc., but absque subtractione, which may extend to any movables, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specifications, &c.

BENNET v. MELLOR, 5 T. R. 273.

(1793)

The defendant was an innkeeper, against whom the plaintiff brought his action for the value of goods stolen out of the inn. At the trial before Buller, J., at the last Lancaster assizes, it appeared that the plaintiff's servant had taken the goods in question to market at Manchester, and not being able to dispose of them went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the week following (meaning the next market day); she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him. When he got up after sitting there a little while, the goods were missing. A verdict was found for the plaintiff.

ASHHURST, J. It does not appear to me that there is any ground for granting a new trial. If it had appeared, as the defendant's counsel have suggested, that these goods were lost through the mere negligence of the plaintiff's servants, the case might have deserved greater consideration; but nothing of that kind appears on the judge's report. According to the report, the case was simply this: the plaintiff's servant came to the inn, and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week; that proposal was rejected; then he sat down in the inn as a guest, with the goods behind him, and during that time the goods were taken away. But, although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest.

BULLER, J. Although the defendant refused to take charge of the goods until the next week, the circumstances of the case dis-

tinguish it from that cited, where the innkeeper said his house was full and refused to take in the guest; that, if true, is a good excuse; and if false, the innkeeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week; if the defendant had taken the goods upon that request, he could only have been liable as a bailee; but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be in the inn, that is sufficient to charge him. In Calye's case it is said, "Although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away or stolen, the innkeeper shall be charged; and therewith agrees 42 Ed. 3. 11 a." There it is said that on the words of the writ the innkeeper is answerable for everything in his inn, but not for a horse, which the owner orders to be put out in the pasture. One of the passages cited from Com. Dig. cannot be supported, if taken in a general sense; for all the authorities agree that it is not necessary to prove negligence in the innkeeper.

GROSE, J. Calye's case, which is a good comment on the writ which gives the action, decides this present case. According to that, if a man go into an inn and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest; and so says the case in Dyer. If indeed the innkeeper had refused to take in the plaintiff's servant, as a guest, and he had notwithstanding gone into the inn, the plaintiff could not have charged the defendant with the loss of his goods; in such a case the innkeeper refuses at his peril, and if it be without reason, an action lies for the refusal; but in this case there was no refusal of the person: the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper (for the latter did not object to receive him), he was in the same situation as any other guest, and entitled to the same protection for his goods.

Rule discharged.[1]

[1] The innkeeper's responsibility is often thought to depend upon the law of bailment, but that this is not so is proven by the fact that his responsibility does not depend in any degree upon delivery to him of the goods for which he is held liable. Coggs v. Bernard, 2

PINKERTON v. WOODWARD, 33 Cal. 557.

(1867)

The defendant was sued as an innkeeper to recover for the loss of one hundred and sixty-eight ounces of gold dust, the property of the plaintiff; fifteen hundred dollars, gold coin, at the time of loss the property of the plaintiff's assignor, Robert Walker; and two hundred and twenty-seven and a half ounces of gold dust, at the time of loss the joint property of the plaintiff's assignors, Michael Lynn and Duncan McKinnon.

On the trial there was evidence tending to prove that the plaintiff and his three companions, Robert Walker, Michael Lynn, and Duncan McKinnon, were residents of Canada, but had been mining at the Cariboo Mines in British Columbia. They left the mines with their gold dust and money, the result of their labors, and started on their journey home in Canada West. They came to San Francisco by steamer, and arrived on the first day of November, 1865, having no business here at all. It was a convenient route, and afforded them the opportunity of traveling by steam from Victoria to San Francisco, and from the latter place to New York. They immediately went to the hotel called the "What Cheer House," of which the defendant was proprietor, and very shortly afterwards engaged passage by the Nicaragua route to New York, on the steamship America, which sailed on the 13th of November, 1865, and expected and intended to embark on her.

Walker had fifteen hundred dollars in gold coin, and the others had their respective bags of gold dust, the amounts being the same that are particularly stated in the complaint. The coin and gold dust were placed in charge of the hotel, and put by the clerk in a safe for that purpose, pursuant to the various notices, rules and regulations posted up in the public places around the hotel and in the rooms of the guests. A register of deposits was kept in the house by the bookkeeper, and the names of the depositors were entered in it, with a description of the articles, and date set opposite. This had been the custom of the house for years.

Ld. Raym. 909 (1703) and Lane v. Cotton, 12 Mod. 472 (1701) did not suggest that an innkeeper is a bailee. Sir William Jones is probably responsible for the inclusion of innkeepers among bailees. Judge Story follows Jones. Beale, Innkeepers, § 182.

In the case of the plaintiff and his companions these formalities were observed, and all the proper entries made in the register, and the clerks of the house were perfectly informed that these were gold dust and coin, and memorandums to that effect were made in the register. The defendant did not live at the hotel, but exercised a general supervision over it, and chiefly depended on his agents and employes at the house.

That the rule and custom generally observed at the What Cheer House at the times the plaintiff and his assignors stopped there, was that persons stopping there, and who applied for rooms and lodging, were required to pay for such room and lodging in advance, and persons eating at the restaurant, (which was kept in the basement of the building, and managed and conducted by and for the benefit of defendant, Charles Quast, and Charles J. Woodward, but in the name of the defendant,) whether lodging at the What Cheer House or not, were required to pay for each meal as it was eaten. The rule at the restaurant was not inflexible, however, and was not enforced as to the plaintiff, who settled for a portion of the meals eaten by him and his assignors with the clerk of the What Cheer House by general bill.

On the 13th of November, 1865, at 3 o'clock, a. m., the safe of the What Cheer House, in which the treasures of the plaintiff and his assignors were deposited, was broken into, and their property stolen and carried away. The money and treasure was deposited in a safe known as a "Tilton and McFarland Safe." At the time of the robbery the combination lock was not turned on. Other than this, all usual and necessary precautions seemed to have been adopted for the safety of the treasure contained in the safe. A portion of the plaintiff's money was not brought by him to the What Cheer House on his first arrival, but was received by him and deposited, several days after, in the safe, as the residue had already been deposited.

The three others assigned their claims to Pinkerton, who brought this action against the defendant, as an innkeeper, for the amount of the loss.

A verdict and judgment were rendered and entered for the plaintiff for ten thousand seven hundred and eighty-eight dollars. By the terms of the judgment the sum of fifteen hundred dollars, being a portion of said judgment, was made payable in gold coin only.

The defendant moved for a new trial upon the grounds, among many others, that the verdict was against the evidence, and that the verdict and evidence were against law; that the Court erred in giving to the jury the instructions that were given, and erred in refusing to give to the jury the instructions asked for by the defendant.

The motion was denied, and from the order denying the same, and from the judgment, the defendant appealed.

By the Court, RHODES, J.:

The definition of an inn, given by Mr. Justice Bayley, in Thompson v. Lacy, 3 B. and Ald. 286, as "a house where a traveler is furnished with everything which he has occasion for while on his way," is comprehensive enough to include every description of an inn; but a house that does not fill the full measure of this definition may be an inn. It probably would not now be regarded as essential to an inn that wine or spirituous or malt liquors should be provided for the guests. At an inn of the greatest completeness entertainment is furnished for the traveler's horse as well as for the traveler, but it has long since been held that this was not essential to give character to the house as an inn. (See Thompson v. Lacy, supra; 2 Kent, 595; 1 Smith Lead. Cases, notes to Coggs v. Bernard; Sto. on Bail. Sec. 475; Kisten v. Hildebrand, 9 B. Mon. 74.) In Wintermute v. Clarke, 5 Sandf. 247, an inn is defined as a public house of entertainment for all who choose to visit it. The defendant insists that the "What Cheer House" was a lodging house and not an inn; because, as he says, the eating department was distinct from the lodging department. It appears that in the basement of the "What Cheer House," and connected with it by a stairway, there was a restaurant, which was conducted by the defendant and two other persons jointly, and that the three shared the profits. Where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper, and in that capacity, is accustomed to receive travelers as his guests, and solicits a continuance of their patronage, and a traveler relying on such representations goes to the house to receive such entertainment as he has occasion for, the relation of innkeeper and guest is created, and the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper. The rates regulating the respective rights, duties and responsi-

bilities of innkeeper and guest have their origin in considerations of public policy, and were designed mainly for the protection and security of travelers and their property. They would afford the traveler but poor security if, before venturing to entrust his property to one who by his agents, cards, bills, advertisements, sign, and all the means by which publicity and notoriety can be given to his business, represents himself as an innkeeper, he is required to inquire of the employes as to their interest in the establishment, or take notice of the agencies or means by which the several departments are conducted. The same considerations of public policy that dictated those rules demand that the innkeeper should be held to the responsibilities which, by his representations, he induced his guest to believe he would assume. We think the jury were fully warranted by the evidence in finding that the "What Cheer House" was an inn, and that the defendant was an innkeeper; and the Court correctly instructed the jury in respect to those facts.

II. Very little need be said upon the question whether the plaintiff and his assignors were guests at the defendant's inn. A traveler who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion for, as his wants are supplied. We see no reason why the innkeeper may not require payment in advance or why the guest may not pay in advance for lodgings for a part or all the time he intends to remain as a guest at the inn. There can be no doubt from the evidence that the plaintiff and his assignors went to the "What Cheer House" as travelers and intended to have left for New York on the day the robbery was committed.

III. Did the defendant receive the coin and gold dust as a bailee without hire, or in the character of innkeeper? In Mateer v. Brown, 1 Cal. 221, it is held that that was a question of fact, and the question was directed to be submitted to the jury. It was shown, beyond all controversy, that the gold dust was taken to the inn several days after the plaintiff arrived there as a guest. If that circumstance would have relieved the defendant of responsibility as an innkeeper, the question would not have been directed to be submitted to the jury, for it would be useless

to find that he received it as innkeeper unless he could be held responsible in that capacity. That case is authority that the innkeeper may be held responsible for the property of the guest, placed under his care, after the owner of the property has become a guest at the inn. Two of the guests, in this case, deposited their gold dust with the defendant on their arrival at the hotel, and the others—the plaintiff and Walker—made their deposits after they had been at the hotel ten days. No reason is perceived why the responsibility of the innkeeper, for the safe keeping of his agents' property should be limited to such property as the guest may have in his immediate possession at the moment of his arrival at the inn. The relation of innkeeper and guest, out of which springs the responsibility, is the same, whether the guest's baggage is conveyed to the inn with him, or at a subsequent time; or whether he then has in his possession or afterwards procures the money, clothing, etc., that he may need on his journey.

The guests of the house were requested not to leave money or articles of value in their rooms, but to deposit the same for safe keeping in a safe at the office, and there is nothing in the case to show that the deposits were made by the guests or received by the innkeeper for any other reason or purpose than in pursuance of such request and the better to enable the innkeeper to give that care and security to the property which are required of him by law. In Needles v. Howard, 1 E. D. Smith, 55, and Stanton v. Leland, 4 E. D. Smith, 94, the material questions arising upon this point were very fully considered and the conclusion reached was adverse to the position of the defendant. The instruction requested by the defendant on this point was liable to the objection stated by the Court as the ground of its refusal, that it was likely to mislead the jury. The kind of bailment denominated in the instruction "ordinary bailment," is not defined or in any way distinguished from that bailment which arises when a guest places his property in the custody of an innkeeper in the customary mode.

IV. The fourth point as stated by the defendant is, "Was the money, etc., lost by a forcible robbery, without fault, carelessness, negligence, or connivance of defendant, his servants or guests?" We think the jury were justified in answering the question in the negative, because of the neglect of the defendant's

clerk to turn on the safe the combination lock. But under this point counsel have discussed the question whether an innkeeper is an insurer of the property of his guest, committed to his care. The authorities do not agree upon this question. Some of the cases hold that the innkeeper is not responsible when the loss was occasioned by inevitable casualty, by irresistible force, by superior force, or by robbery or burglary, committed by persons from without the inn; and some go even further and hold that the presumption of negligence may be rebutted, by showing that there was no negligence in point of fact on his part, or that of his servants. But the preponderating weight of authority, from the time of the decision in Calye's Case, 8 Coke, 32, to the present time is in favor of the rule that he is liable as an insurer. The rule is thus stated in 1 Pars. on Cont. 623: "Public policy imposes upon an innkeeper a severe liability. The later, and on the whole, prevailing, authorities make him an insurer of the property committed to his care, against everything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property. He would then be liable for a loss occasioned by his own servants, by other guests, by robbery or burglary from without the house, or by rioters or mobs." The rule is carried to the same extent in Mateer v. Brown, 1 Cal. 221. We deem it unnecessary at this time to enter upon a review of the cases, or to recapitulate the argument or reasons in support of the rule, as this has very fully been done in Shaw v. Berry, 31 Maine, 478; Sibley v. Aldrich, 33 N. H. 553; Hulet v. Swift, 42 Barb. 249, S. C.; and 33 N. Y. 571. (See, also, Grinnell v. Cook, 3 Hill, 485; Thickstone v. Howard, 8 Blackf. 535; Piper v. Manny, 21 Wend. 282; Mason v. Thompson, 9 Pick. 280.)

V. The fifth point is that the defendant is not liable for an amount beyond what is sufficient for the reasonable traveling expenses of the plaintiff and his assignors. The gold dust was not money, any more than are bank bills, or Government stocks or securities; but it was so readily convertible into money at San Francisco that for the purposes of this question it may be treated as money. The doctrine of Mateer v. Brown is opposed to the limited liability contended for. It would be altogether impracticable for the Court to lay down any rules for determining what would be reasonable traveling expenses. One person might choose to make the trip in the cheapest manner, and another

might indulge in the most lavish expenditures. The contingencies to which the party might be subject on his journey could not be anticipated, nor the expenses calculated with any certainty. But if the innkeeper is authorized in any case to supervise the expenditures of his guest there was nothing of that character manifested here. The notice to the guests was that the innkeeper would not hold himself responsible for their money or articles of value unless they were deposited in the safe at the office. There was no limit indicated as to the amount or value that might be deposited; and it appears that at the time the safe was robbed it contained money and gold dust, deposited by guests, of about the amount of thirty thousand dollars. These deposits were being made every day, and entries thereof were made in a book kept for that purpose. The evidence shows that the receipt and entry of such deposits was a part of the regular and usual business of the hotel. The plan was devised and carried on, not only for the innkeeper's protection, but to induce travelers to patronize the hotel, by offering them greater security for their property. After having thus offered, as an innkeeper, to take charge of the money of his guests, and having received it on deposit and placed it where such property was usually kept, he cannot avoid responsibility for its loss, by saying that the guest deposited too much money. It is too late to raise the objection that the amount of money was larger than the guest might need for his reasonable expenses after the money deposited according to the rules of the inn has been stolen, even admitting that the objection would be good before the deposit was made.

Several of the cases cited by the defendant support the position that the innkeeper is not responsible for everything that the guest may choose to bring to the inn; but we apprehend that he would not have been relieved of responsibility in any of those cases had the property at his request been committed to his special care and custody. In Calye's Case it was resolved that "if one brings a bag or chest, etc., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." The language of Mr. Chancellor Kent is equally strong: "The responsibility of the innkeeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest which are placed within the inn." (2 Kent,

593.) There are many cases in which it is held that his responsibility extends to money and chattels other than such as are provided by the guest for his necessary or convenient use while traveling. In Clute v. Wiggins, 14 Johns. 175, the guest recovered for certain bags of wheat and barley. In Piper v. Manny, 21 Wend. 282, the recovery was for a tub of butter. In Snider v. Geiss, 1 Yeates, 34, the innkeeper was held liable for two hundred and thirty Spanish milled dollars. In Hulett v. Swift, 33 N. Y. 571, the plaintiff recovered the value of his horses, wagon and a load of buckskin goods. In Townson v. Havre de Grace Bank, 6 Har. & John, 47, the property in controversy was one thousand dollars, in bank bills. In Mateer v. Brown, the amount deposited was five thousand five hundred dollars, in gold dust. The doctrine laid down in Purvis v. Coleman, 21 N. Y. 112, applies with very decided force to the question here. A sum of money, four hundred sovereigns, was stolen from the plaintiff's trunk, which was in a room in the hotel, assigned to the plaintiff. Notice, in fact, had been given to the plaintiff, on his arrival, that the defendants had provided a safe for the deposit of the valuables of their guests, and that they would not be liable for their loss, unless they were deposited in the safe. The Court declared that "at common law the defendants were liable for all losses of the property of their guests infra hospitium," excepting, of course, those occasioned by the act of God or the public enemy, or the neglect or fraud of the guest; but that the Legislature had modified this strict liability at common law, by enacting that if the proprietor of a hotel should furnish a safe at the office of the hotel for the safe keeping of the money and other valuables of his guests, and should notify them thereof by posting notices in the rooms occupied by his guests, he should not be liable for any loss of money or valuables, etc., if the guests should neglect to deposit the same in such safe. The Court affirmed the judgment for the defendants on two grounds. 1st, that the actual notice was sufficient under the statute without proof of the constructive notices, by posting the notice in the room of the guest; and 2d, that the guest having received the notice in fact, and failing to comply with it, was guilty of negligence, and must bear the loss. A majority of the Court concurred on the first ground, and the whole Court concurred on the second ground. One purpose of the Act, it was held, was to enable

the host to relieve himself of his common law liability—that is, of liability for the loss of the money or the valuables of the guest who neglected compliance with the notice. That was the main object of the Act, although it was at the same time intended to provide for the security of the guest. That was precisely the purpose of the notice in this case, which was given to the guests by posting the rules of the house in the rooms occupied by them. The statute of New York was, in truth, only declaratory of the law in such cases, except only in respect to constructive notice, which is made equivalent to actual notice. In passing upon the second ground, it was held that, when the notice in fact was given, independently of the statute, the innkeeper would not be responsible for the loss when the guest neglected to comply with the requirements of the notice. It necessarily follows that he would have been responsible for the loss had the guest made the deposit in compliance with the notice. The statute, then, conferred upon him no right or privilege but that of imparting notice by posting the same in the manner therein prescribed, and neither added to nor diminished the responsibility that he would have incurred had he received the money on deposit, in pursuance of a notice in fact, and in the course of the usual and customary business of the hotel. Nothing is said in that case as to there being an excess of money beyond what was needed for traveling expenses and personal use, but if there is anything in the point it was obvious, from the amount of money involved.

The authorities cited by the defendant throw some light on the question. Thus in Orange County Bank v. Brown, 9 Wend. 85, the plaintiff sought to recover from a common carrier for the loss of eleven thousand dollars, which the plaintiff's agent was conveying in his trunk. He stated to the officers of the boat that the trunk was valuable, but not that it contained money. He placed the trunk in the office, as he was directed by the clerk, and it was stolen from that place. Mr. Justice Nelson, in delivering the opinion of the Court, said: "Now upon the ground that the defendants in this case have received no compensation or reward from the plaintiffs or any other person for the transportation or risk of the money, and that they were deprived of such reward by the unfair dealing of the agent of the plaintiffs with the defendants, I am of opinion that the plaintiffs cannot recover, and that they were properly nonsuited on the trial." Miles

v. Cattle, 19 Com. L. R., 333, cited in that case, was decided on the same ground—that the defendant was entitled to compensation for the transportation and risk of the money, but it was carried among the baggage of the passengers without informing the defendants. The same principle was applied in Pardee v. Drew, 25 Wend. 459, when the attempt was made to have merchandise transported as baggage, without disclosing its presence. See also Hawkins v. Hoffman, 6 Hill, 588, where the same doctrine is announced. It was held—Mr. Justice Bronson delivering the opinion—that the contract to convey the baggage of the passenger was implied from the usual course of business, and that the price paid for fare is considered as a compensation for carrying the baggage; but that baggage did not include money or merchandise. In respect to innkeepers, none of the cases in which the grounds of liability is considered holds that he is entitled to any separate compensation for the care of the guest's property, and as he is not entitled to separate compensation on account of the property, we cannot see how he can complain that the guest has in his trunk or has deposited in the safe more money than was reasonable for his traveling expenses. His implied contract covers it all, whatever it may be. Berkshire Woolen Co. v. Proctor, 7 Cushing, 423, is decisive, as authority, of this question. The sum of five hundred dollars was stolen from the trunk of the plaintiff's agent, which was in a room occupied by him in the defendant's hotel. This question was fully considered by the Court, and it was held that "the responsibility of innkeepers for the safety of the goods and chattels and money of their guests is founded on the great principle of public utility, and is not restricted to any particular or limited amount of goods or money."

Here there is no ground for saying that the guest manifested a lack of care, for he placed his money where the innkeeper assured him it would be safe. He, as innkeeper, notified his guest to deposit his money in the safe and he received it as an innkeeper in the usual course of his business, and he must respond as an innkeeper for its loss.

Wilkins v. Earle, 4 Am. Law. Reg., New Series, 742, is cited by the defendant, as very cogent authority in support of his position. * * * The cases cited by the Court include as baggage a watch, articles of jewelry, a gun and the tools of a trade, if carried in a trunk, and generally everything destined

for the personal use, convenience, and even instruction and amusement of a passenger. Suppose two travelers on their way to the same destination, the one having in his possession a watch, jewelry and some other of the articles above mentioned, and the other having the money with which he intends to purchase articles similar to those possessed by his comrade, and both are robbed at an inn. We are unable to see why the innkeeper should not be responsible to the latter as well as the former. How can it make any difference in his liability because the one chooses to wear his gold "specimen" in the form of a pin, and the other carries his in his purse? Both are entitled to the same care and protection, and any attempt to discriminate between the liability of the innkeeper for these respective cases leads to inconsistencies if not to absurdities. This case was decided at about the same time as Hulett v. Swift, 33 New York, 571, though neither case is referred to in the other; but we prefer to follow the higher, and, in our opinion, the better authority. * * *

Judgment reversed and cause remanded for a new trial, unless plaintiff within twenty days after receiving written notice that the remittitur is filed in the Court below, release one hundred and thirty-one dollars and twenty cents of the judgment, and if such release is filed then the judgment shall stand affirmed.

CUTLER v. BONNEY, 30 Mich. 259.

(1874)

Action against an innkeeper for loss due to fire. Judgment for defendants.

CAMPBELL, J. Plaintiffs brought suit to recover the value of certain horses, a wagon, and some goods destroyed by fire in the barn of defendants, who were innkeepers. It is found by the court that there was no fault or negligence in defendants or their servants, the fire which destroyed the barn and its contents having been either accidental or incidental, and taking from an alley or public way outside. No question arises upon anything except the obligation of innkeepers to respond to their guests for property thus destroyed without negligence. It is admitted that the property was in the custody of defendants in that capacity.

It is unfortunate that upon this subject there is some confusion, arising from the loose dicta in which many courts have indulged, when dealing with cases involving the liability of innkeepers. It is unsafe to give any force to such remarks beyond the analogies of the cases in which they are found. Upon all questions not decided by recognized and accepted precedents, we can only rest upon the ancient maxims of the common law.

In order to hold a bailee liable for that which is in no respect to be imputed either to his own negligence or to that of persons for whom he is responsible, there should be found clear authority. The common law has declared this liability against one class of bailees, and has made common carriers responsible for all losses not caused by public enemies, or some casualty in no way arising out of human action. It is claimed by plaintiffs that in this respect common carriers and innkeepers stand on precisely the same footing; and it is claimed that defendants can be made liable in the present case on any narrower ground.

There are many cases in which it has been said by judges that the liability is not distinguishable. Most of these have been collected in the notes of Mr. Holmes to the last edition of Kent's Commentaries.—2 Kent, 596. But, except in the decisions to be especially referred to hereafter, there is nothing in the facts of any authority which we have discovered, which called for any such remarks, or which would justify the enforcement of a liability for such loss as the present.

With one or two exceptions the cases referred to have arisen from thefts or unexplained losses of property, while it was within the legal custody or protection of the innkeeper. The rule actually applied in all of these cases has been that all such losses were presumably due to the neglect of the innkeeper. Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within, or unexplained, whether committed by guests, servants, or strangers. But he has quite as uniformly been discharged, by any negligence of the guest conducing to the injury, and he has not been held for acts done by the servants of guests, or by those whom they have admitted into their rooms. And in many cases he has been held discharged where the guest has exercised any special control over his prop-

erty. The general principle seems to be that the innkeeper guarantees the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guarantee.

Beyond this, we have found no decided case anywhere. We have found no decision holding innkeepers liable for losses by purely accidental casualties, or from riots, or acts of force from without, such as have been from the beginning excepted by the text writers. These writers, or at least such of them as are of recognized authority, have drawn a line between carriers and innkeepers, resting on the distinction between absolute and qualified responsibility. And none of the accepted writers have found any authority for disregarding this distinction. The two classes of bailees have been kept carefully separate.

Judge Story makes this very clear in his Treatise on Bailments, § 472, where he refers to authorities which we think sustain him. Dawson v. Chamney, 5 Q. B. 164, is directly in point, and the language of the older decisions there referred to excludes the extreme measure of liability. Chancellor Kent is equally explicit that the liability does not extend to robbery or inevitable casualty. 2 Kent's Com. 593. The Roman law, to which both of them refer, included fire under this head. The French law excludes liability for wrongs from without. Ferriere Dic., "Aubergistes;" Story on Bailm., § 465.

But all the modern authorities profess to take their departure from Calye's Case, 8 Co. 32. The case declares that the original writ quoted in it, and found in Fitzherbert's N. B. 94 B., contains the whole ground of the common law. Analyzing the writ, the fourth heading is made to refer to the ground of liability as the default of the innkeeper, "by which it appears that the innholder shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guests, goods and chattels within his common inn." The language in Fitzherbert is, "so that by the default of them, the innkeepers or their servants, no damage may come in any manner to their guests." Among the defenses given by Saunders is that "defendant may show that his house was broken open, and a forcible robbery of them committed by thieves." 2 Saund. Pl. & E. 217. And the liability of innkeepers for the

acts of others is put by Blackstone on the ground that they were bound to prevent misconduct by those under their control. 1 Bl. 403. Accidental fire stands on quite as strong grounds of exemption as other mishaps.

The common law has in some things been modified by decisions, but it is contrary to law to follow dicta made in cases calling for no departure from the old law. It would be a manifest innovation to create a liability where no possible default exists, and to sustain such an innovation, there ought to be both reason and authority. We cannot object to follow settled law on our own views of what policy ought to make it. But we are not prepared to assume there is any policy which will compel persons who are in no wise in fault to respond in damages, where the law is not clear against them. And the authorities directly in point on losses by fire are not numerous, and do not, in our judgment, call for any such consequences.

The doctrine imposing such a liability may be said to rest entirely on what was said by Justice Porter in Hulett v. Swift, 33 N. Y. 571, 88 Am. D. 405. In that case the subject is discussed at some length, and with much ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text-books, and which were foreign to what was actually decided in the cases where they are found. The whole opinion of the learned judge is open to the same criticism; as he himself declares, the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of Judge Denio would detract much from its force, even if it had been pertinent to the facts.

Opposed to this is the case of Merritt v. Claghorn, 23 Vt. 177, in which Judge Redfield, delivering the opinion of the court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire. This opinion is an able one, and was not given beyond the facts. It has been both approved and criticised, but no occasion has heretofore arisen to consider its correctness upon similar facts. Vance v. Throckmorton, 5 Bush. (Ky.) 42, 96 Am. D. 327, is to the same effect, but there, too, the decision might have rested on other grounds, and its authority is therefore diminished.

We regard the decision in Vermont as reasonable, and as within the fair meaning of the common-law rule. We think the Circuit Court was right in taking the same view.

The judgment must be affirmed, with costs.

The other justices concurred.

Judgment affirmed.[1]

SPRING v. HAGER ET AL., 145 Mass. 186.

(1887)

Tort against the keepers of an inn, called the Elm House, in Greenfield, for the value of a watch, chain, and a sum of money, alleged to have been stolen while the plaintiff was a guest at the inn. Trial in the Superior Court, before Barker, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff, who was a grain-dealer, about fifty years of age, and lived in Erving, came to Greenfield to attend court, as one of the grand jurors. On the first day of court, at noon, he registered as a guest at the Elm House, having on his person a gold watch of the value of about $100, and a gold watch chain of the value of about $40. The watch was carried in the watch pocket of his waistcoat, and the chain was attached to the waistcoat; and he had in the pocket of his trousers $15 or $20 in money. It was admitted by the defendants, at the trial, that the watch and chain were articles worn or carried on the person, and were reasonable in value and amount, and that the money was for traveling expenses and personal use.

On the evening of that day, about half-past nine, the plaintiff was shown to his room by one of the defendants, who left with the plaintiff a glass kerosene lamp, such as is commonly used in country hotels. There was no gas or other light in the room. On the walls of this room were a large number of pictures of noted singers and actresses and performers, such pictures as are distributed for advertisements. The room was about ten feet

[1] In England it was declared, in Dawson v. Chamney (1843) 5 Q. B. 164, that the liability of the innkeeper is grounded on negligence. This was contrary to previous decisions, and was subsequently repudiated in Morgan v. Ravey (1861) 6 H. & N. 265. In America, some decisions follow Dawson v. Chamney and the prima facie liability rule, while others follow the stricter English rule. Street, Foundations of Legal Liability, 295-6.

wide and fifteen feet long, and had but one door. The plaintiff took the lamp from said defendant, and, as soon as the defendant left, closed the door and locked it, but did not bolt it. The lock was a common mortise lock connected with the door knob. After locking his door, the plaintiff looked at the pictures on three sides of the room, and prepared to retire. His waistcoat, with the watch in it and the chain attached, he laid upon a light stand on the farther side of the bed from the door, and near the head of the bed; his trousers containing the money he laid upon a chair, and retired. When he awoke in the morning, it was found that, during the night, the lock on the door had been picked, the room entered, and the trousers and waistcoat carried away by some person unknown. The waistcoat was soon found in the hallway, and the trousers were found in the street at some distance from the hotel, and the watch and chain and the money had been stolen. The door to the room was found to be slightly open.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

FIELD, J. The only negligence of the plaintiff which the defendants contended that the evidence proved, was the neglect of the plaintiff to bolt the door. The plaintiff locked the door by a lock connected with the door knob. The bolt was on the inside of the door, six inches from the top, and the door was "about six feet and six inches high." The plaintiff testified that "he did not know it was there until after the robbery." It does not appear that there were any regulations of the inn, which were posted in the room or anywhere else, or which were in any manner brought to the notice of the plaintiff, and it is conceded that the attention of the plaintiff "was not called by the defendants or by any one else to the bolt." The defendants contended, however, upon all the evidence, that the "plaintiff must have seen the bolt." The first request of the plaintiff for a ruling was, in effect, that his failure to bolt the door after having locked it was not such negligence as would defeat the action, even if he saw the bolt; and the second request was, in effect, that his failure to bolt the door after having locked it would not defeat the action, "if said bolt was not known to the plaintiff, nor his attention in any way called to the same." This second request raises the question whether it was the duty of the plaintiff to examine the door to see if there were other fastenings upon it

besides the lock. It may be conceded that the bolt and lock together afforded greater security than either of them alone, and that, although the bolt was in an unusual place upon the door, it could easily have been seen if the plaintiff had searched for it.

The Pub. Sts. c. 102, § 16, provide that "An innholder against whom a claim is made for loss sustained by a guest may in all cases show that such loss is attributable to the negligence of the guest himself, or to his non-compliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the guest by the innholder." This provision was first enacted in the St. of 1853, c. 405, § 3, which was soon after the decision in Berkshire Woollen Co. v. Proctor, 7 Cush. 417; and, although this statute made some changes in the law, the clause that it is competent for an innkeeper to show that the loss is attributable to the negligence of the guest is only declaratory of the common law. Mason v. Thompson, 9 Pick. 280; Berkshire Woollen Co. v. Proctor, ubi supra; Elcox v. Hill, 98 U. S. 218; Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515; Cashill v. Wright, 6 El. & Bl. 890; Morgan v. Ravey, 6 H. & N. 265.

It has indeed been said that, "in the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law." Murchison v. Sergent, 69 Ga. 206, 213. It has been often decided that not locking or fastening the door of a bedroom is not, as matter of law, negligence, but that this fact, in connection with others, may be evidence of negligence for the jury; and the weight of modern authority is, we think, that the failure to lock or bolt the door of a lodging-room at an inn, when there is a lock or bolt upon it, is evidence of negligence for the jury. Oppenheim v. White Lion Hotel Co., ubi supra; Spice v. Bacon, 36 L. T. (N. S.) 896; Herbert v. Markwell, 45 L. T. (N. S.) 649.

At common law, "innkeeper, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, or the neglect or fault of the owner of the property." Mason v. Thompson, 9 Pick. 284.

The statutes have not changed the general nature of the liability of an innholder; and, subject to the statutory provisions, he is liable to his guests in cases where no actual negligence on the

part of himself or his servants is shown. It has been held that the burden of proof is upon the innholder to show that the loss was caused by the negligence of his guest. Norcross v. Norcross, 53 Maine, 163. The language of the Pub. Sts. c. 102, § 16, implies that this burden is upon the innholder. The case at bar is not, therefore, an action for negligence, and it may be doubted whether the rulings in such actions upon evidence of contributory negligence are in all respects applicable.

No case has been cited in which it has been held that the single fact that the plaintiff did not bolt his door, after having locked it on the inside, is sufficient evidence of negligence.

In Spice v. Bacon, and in Herbert v. Markwell, ubi supra, the jury must have found that the door was left unfastened either by bolt or lock.

In Morgan v. Rarey, 2 F. & F. 283, it is said that the plaintiff locked the door, but did not bolt it. In the same case, in the Court of Exchequer, 6 H. & N. 265, 266, it is said that "witnesses were, however, called, on the part of the defendants, to prove that the plaintiff had told them that he had not locked the door." It was admitted that he did not use the bolt. There was a notice posted over the mantel-piece requesting "all visitors to use the night bolt," which the plaintiff admitted he saw, but said he did not read beyond the word "notice." Chief Baron Pollock, at nisi prius, left the question of negligence to the jury, but told "them at the same time that the guest was not bound to lock his bedroom door, &c." The verdict was for the plaintiff.

It must often depend much upon the circumstances of the case, the customs of the age and country, and the usages of the place, whether the plaintiff has been guilty of such negligence that the loss can be said to be attributable to it; and we cannot say, as matter of law, that, on the facts appearing in this case, if the plaintiff saw the bolt and did not use it, this was not some evidence of negligence to be submitted to the jury. The delivery of a key to a guest may be held to be an intimation to him that he is to use it in locking his door. The lock, however, is the only fastening which the guest can use when he is not in the room. A bolt, if seen, may itself suggest that it ought to be used. If, however, there are no regulations brought to the notice of a guest requesting him to bolt the door, and if it is not known to the guest that there is a bolt, and his attention is not

in any way called to it, we are of opinion that the fact that, after locking his door with the key, he does not search for a bolt and find it, is not evidence of negligence on his part, and that the second ruling requested should have been given. See Murchison v. Sergent, ubi supra; Batterson v. Vogel, 10 Mo. App. 235.

Exception sustained.

FAY v. PACIFIC IMPROVEMENT CO., 93 Cal. 253.

(1892)

Action against an innkeeper for damages to jewelry by fire.

THE COURT. Upon further consideration of this cause, after hearing en banc, we are satisfied with the conclusion reached in Department, and with the opinion there rendered, and for the reasons stated in said opinion the judgment and order appealed from are affirmed.

The following is the opinion of Department Two, above referred to: * * *

DE HAVEN, J. The plaintiff recovered judgment against the defendant for damages occasioned by the loss of her jewelry, wearing apparel, and other articles of personal property needed for her personal use, consumed by fire at the burning of the Hotel Del Monte, April 1, 1887, of which the defendant was at that time the proprietor.

The court below found that the Hotel Del Monte was, at the date named, a public inn, and that the plaintiff was a guest therein. On this appeal the defendant claims that the evidence does not sustain these findings; and also that the burning of the hotel was an irresistible superhuman cause, for which it is not liable, and that it is not, in any event, liable for plaintiff's diamonds and other jewelry, because not deposited in defendant's safe.

1. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation,—a hotel. In Wintermute v. Clark, 5 Sand. 247, an inn is defined as a public house of entertainment for all who choose to visit it, and this definition was quoted with approval by this court in Pinkerton v. Woodward, 33 Cal. 596; 91 Am. Dec. 657. The fact that the house is open for the public, that those who patronize

it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding-house. This difference is thus stated in Schouler on Bailments: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode": Schouler on Bailments, 253.

We think the evidence in this case is full and complete to the point that the Hotel Del Monte was a public inn. It not only had a name indicating its character as such, but it was also shown that it was open to all persons who have a right to demand entertainment at a public house; that it solicited public patronage by advertising and in the distribution of its business cards, and kept a public register in which its guests entered their names upon arrival and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; that it had its manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of a hotel, and the prices charged were for board and lodging. These facts were certainly sufficient to justify the court in finding, as it did, that the appellant was an innkeeper: Krohn v. Sweeny, 2 Daly, 200. Nor was the force of this evidence in any wise modified by the fact that the hotel was not immediately upon a highway, or that the grounds upon which it stood were inclosed and the gates closed at night. The location of the hotel, the extent of the grounds surrounding it, and the manner in which these grounds were improved, and reserved for the exclusive use and enjoyment of those who patronized it, doubtless made the hotel more attractive to those who chose to make a transient resort of it, but did not convert it into a mere boarding-house. A hotel is none the less one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public

as a place for the entertainment of all transient persons who may have occasion to patronize it. * * *

2. The evidence shows that the plaintiff was a guest, and not a boarder. The fact that upon her arrival, and before being assigned to her room, she ascertained what she would have to pay for the room and board is not sufficient of itself to show that she was not received as a guest. Pinkerton v. Woodward, 33 Cal. 597; 91 Am. Dec. 657; Hancock v. Rand, 94 N. Y. 1; 46 Am. Rep. 112; Jalie v. Cardinal, 35 Wis. 118; Hall v. Pike, 100 Mass. 495; Berkshire Woolen Co. v. Proctor, 7 Cush. 417.

The Del Monte being a public hotel, in the absence of evidence showing that plaintiff went there as a boarder, the presumption would be that she went there as a guest. Hall v. Pike, 100 Mass. 495. Not only does the evidence fail to overthrow this presumption, but the testimony of the plaintiff shows that she was there as a mere temporary sojourner, without any agreement as to the time she should stay, and with only the intention on her part of resting a week or two, and then proceeding to the East. She obtained no reduction of price in consideration of an agreement to remain a definite time, or as a boarder; nor was there anything said from which it could be inferred that there was any understanding between her and the defendant that she was to be received as a boarder, and not as a guest.

3. Under section 1859 of the Civil Code, an innkeeper is liable for the loss of personal property placed by his guests under his care, "unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn."

In this case the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown, further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts, the defendant is liable: Hulett v. Swift, 33 N. Y. 571; 88 Am. Dec. 405. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence and care, and the use of those appliances which

it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding-house. This difference is thus stated in Schouler on Bailments: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode": Schouler on Bailments, 253.

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In this case the loss was occasioned by the burning of the hotel, and the origin of the fire is not shown, further than that it broke out in one of the rooms in which there was nothing except the batteries which supplied the bells with electricity. Under this state of facts, the defendant is liable: Hulett v. Swift, 33 N. Y. 571; 88 Am. Dec. 405. A fire thus occurring cannot be considered an "irresistible superhuman cause," within the meaning of section 1859 of the Civil Code. The words "irresistible superhuman cause" are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence and care, and the use of those appliances which

the situation of the party renders it reasonable that he should employ: 1 Am. & Eng. Ency. of Law, 174. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency: Miller v. Steam Nav. Co., 10 N. Y. 431; Chicago, etc., R. R. Co. v. Sawyer, 69 Ill. 285; 18 Am. Rep. 613.

4. The court finds that the property lost was such as was needed for the present personal use of the plaintiff. We cannot say that the evidence does not support this finding. It certainly cannot be said that jewelry worn by a woman daily must, when not actually upon her person, be deposited with the innkeeper, in order to make him responsible for its loss in the inn. If worn daily, it does not cease to be needed for present personal use when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession.

"The guest may retain personal custody of his goods within the inn,—as of his trunk and its contents, his wearing apparel, and other articles in his room, and any jewelry or valuables carried or worn around his person,—without discharging the innkeeper from responsibility": Jalie v. Cardinal, 35 Wis. 126.

We have examined the other points made by appellant, but do not think they call for special discussion.

The rule which makes an innkeeper liable for the value of the property of his guest, in case of its loss by fire, may at first thought be deemed a harsh one; but the loss must fall somewhere. and section 1859 of the Civil Code provides upon whom it should properly fall, and the innkeeper's liability in this respect is one of the burdens pertaining to the business in which he is engaged, and in view of which it must be supposed that he regulates his charges.

Judgment and order affirmed.

JOHNSON v. CHADBOURN FINANCE CO., (Supra.)

(1903)

* * * 2. The second question in this case, of importance, is as to the extent of an innkeeper's liability. That he has been held to a very stringent, unyielding rule in this respect is manifest

from an examination of cases. The policy of the law has been to render him liable to the same extent as a common carrier of goods for hire, although there has been much doubt expressed as to this extraordinary responsibility in some cases. That the law requires of him extraordinary diligence in many respects—such as the care of his guest's baggage or other property which has been confided to his actual custody—there can be no doubt.

In the case of Lusk v. Belote, 22 Minn. 469, the common-law rule was adopted, and it was held that a landlord is responsible for the loss in his inn of goods of a traveler who is his guest, except when such loss arises from the negligence of the guest, or the act of God or of the public enemy. There the guest's goods had been stolen from his room. It must be admitted that there has been a strong disposition upon the part of courts to admit of any relaxation, just or unjust, of this rule, and it has been applied to all classes of public hotels. In Edwards on Bailments, sec. 462, it is stated as a reason for so stringent a rule that it was established in a period when theft and robbery were quite frequent, and innkeepers were thought to have many opportunities, and some temptations, to combine and connive with ruffians and others in the plunder of strangers, and that it has been continued in more modern times on the ground of public utility and convenience. In two cases the reason for continuance of such a doctrine has been discussed with great vigor, and, under the circumstances there appearing, not improperly. Hulett v. Swift, 33 N. Y. 571; Wilkins v. Earle, 44 N. Y. 172. But the fact is that, in nearly all of the cases supporting the doctrine of absolute liability, unexplained thefts or losses of property were involved. No distinction was made between goods stolen and goods destroyed by fire for which the landlord was in no manner responsible. That there might be a well-defined distinction does not seem to have been thought of.

But it must be admitted that the logical consequence of the strict rule is that no discrimination can be made between losses arising from thefts by other guests, or by servants, and those which result from such an entirely distinct cause as an accidental fire. However, in a number of states there has been a departure, and there has been adopted what is called the "rule of prima facie liability," and there are also decisions in England to the same effect. The doctrine is thus stated in 16 Am. & Eng. Enc. (2d

Ed.) 536: "An innkeeper is prima facie liable for the loss of goods in his charge, but may discharge himself by showing that it happened by irresistible forces, though not the act of God or a public enemy, or by inevitable accident, or otherwise, without fault or negligence on his part;" a number of cases being cited in support thereof. Cutler v. Bonney, 30 Mich. 259, and Merritt v. Claghorn, 23 Vt. 177, are very strong opinions in support of this rule, and in them the subject is discussed with much force and ability. Vance v. Throckmorton, 5 Bush (Ky.) 41, is also a strong case in support of this view. See also cases cited in note to 16 Am. & Eng. Enc. (2d Ed.) 538.

Conceding that the rigorous rule before stated was just and necessary in its day, there never was any reason or foundation for it in cases where the loss was occasioned by an accidental fire, for which the landlord was not responsible, and when no negligence in connection therewith could be attributed to him. In the present case the fire originated upon premises not occupied by the defendant, and over which it had no control, although in the same building. From the record, it does not appear that the fire spread into that part of the building occupied by the defendant through its negligence; and, as before stated, the jury found, in answer to a special question, that the defendant was not negligent in any manner which contributed to the loss. With these conflicting rules in respect to the liability of the proprietor of a hotel or inn, we are justified in stating one to govern this case which is more just and sensible than the common-law doctrine, before referred to; but we are not quite willing to go to the extent that some of the courts have, and absolve the landlord from all liability in case of loss through thefts if he can show that they were unavoidable accidents, or were otherwise committed without fault or negligence on his part. We do not think that the landlord of a public hotel or inn should in every case of loss be held responsible to the same extent as a common carrier, and that under some circumstances they do not stand upon precisely the same footing. Public policy does not require it, nor is such a doctrine reasonable.

We therefore adopt what is known as the "rule of prima facie liability." All losses of property incurred by guests at a public hotel or inn by fire are prima facie due to the negligence of the proprietor, but he may discharge or relieve himself from

liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part. This doctrine does not infringe upon the common-law rule, which makes him responsible for all thefts from within his house, or unexplained, whether committed by guests, servants, or strangers, upon the general principle that an innkeeper guarantees the good behavior of all who may be under his roof—particularly his servants. The doctrine which we adopt, and which must control this case, is that an action cannot be maintained against hotel or innkeeper by guest to recover for property lost by fire which was occasioned by unavoidable casualty or superior force, and without any negligence on the part of the innkeeper or his servants. A landlord is not liable for a loss by fire happening through a cause beyond his control. He must be reasonably diligent under the circumstances known to exist after the fire breaks out, but it is not necessary that he should be extremely vigilant or cautious.

This rule is more in accordance with our views of justice, and will, we believe, commend itself to all. As before stated, the jury found that there was no negligence on the part of either plaintiff or defendant. If this cause had been properly submitted to the jury, and the jury had been instructed along the lines herein indicated, judgment could properly have been ordered for the defendant, but such was not the case. The trial court was in error not only as to the nature of the establishment kept by the defendant, but it also charged that the burden of proof was upon the plaintiff to show that the defendant was negligent. Such is not the rule, under the doctrine of prima facie liability, herein indorsed.[1]

[1] Innkeeper may limit liability by contract and may make reasonable rules for the conduct of his business. Beale, Innkeepers, Sec. 211-215.

Diligence required of innkeepers,

1. As to the person of the guest,
   a. In early law, none.
   b. In modern law, ordinary diligence.
2. As to the goods of the guest,
   a. In early law, approximately insurer.
   b. In modern law, prima facie liability, but liability may be escaped by showing that loss was not due to innkeeper's negligence.
3. As to goods of boarder, ordinary diligence.
4. As to goods of gratuitous bailor, slight diligence.

3. Rights of Innkeeper.

ROBINSON v. WALTER, 3 Bulst. 269.

(1616)

In an action upon the case for a trover and conversion brought by the plaintiff against the defendant, being an innkeeper, for a horse.

The case, upon the defendant's plea in bar, was this: The defendant keeping a common inn, a stranger brings the plaintiff's horse into this common inn of the defendant, there sets him for some time, and afterwards goes his way, leaving the plaintiff's horse there as a pledge for his meat.

Doddridge, J. This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: he is to receive all guests and horses that come to his inn; he is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat.

The court agreed with him herein, but the court said, that this being a new and good case, they held it fit to be argued by counsel on both sides, and so for this purpose, this case was adjourned to a further time.

Montague, C. J. Where one is hired to serve, there he shall not wage his law, because compellable. Communia hospitia are compellable to receive guests and their horses; and so he is to answer for them, which are brought thither; the custom of London is good and reasonable, how long to stay, not till he eats out more than his head; the innholder may sell him presently, and this is justifiable. Here in this case, the innkeeper said to the plaintiff: Prove the horse to be yours, pay for his meat, and you shall have him. This is no denial, nor yet any conversion; he claims no property at all; he only detains the horse, till he be satisfied for his meat, and so he may well do by the law; he may keep him, till he be paid for his meat, because he is compellable at the first to receive him.

DODDERIDGE, J. One who hath no keeping for his horse, doth devise this way to send his man with him to an inn, and to let him stand there, and afterwards to come thither himself, and of the innkeeper to demand his horse, and upon his refusal to bring this action upon the case; this is a fine trick for the plaintiff to have his horse kept, and to give the innkeeper nothing for the same; but instead of paying of him for his meat, to pay him with an action, which he hath no cause so to do; as this case here is, the innkeeper may well justify the keeping of his horse, till he do pay him for his meat, which is all he desires to have.

HAUGHTON, J., differed in opinion. The party being the true owner of the horse, hath no other way to provide for himself, but this. The innkeeper hath his proper remedy against him, who brought and left the horse for his meat, and for him thus to prejudice the owner of the horse, by the wrong of another, this will be very inconvenient.

CROKE, J. If a stranger takes my cattle, and puts them into the ground of another, he may well keep them till I pay him for their meat, and hurt there done. If a man's horse be stolen, and brought unto an inn, or if a man lend his horse to one for a day, and he keeps him three or four days, the innkeeper here was in no fault at all. If the horse was stolen and brought thither, he cannot charge the innkeeper with this, but he which brought him thither, and there left him. Here the innkeeper hath done no wrong at all, the owner is to satisfy him for his meat, because he was here compellable to receive him.

MONTAGUE. If a stranger takes the horse of another, and sets him up in an inn, if the horse was there stolen away, the party may have his remedy against the innkeeper.

If a man's servant carries his master's horse to an inn, and there leaves him, and he is stolen away; an action lieth here for the master, as well as for the servant, against the innkeeper.

DODDERIDGE agreed this to be so, if he knew him to be his servant; the owner is to pay for his meat, and it would be a very mischievous thing if it should be otherwise; for when a man hath lost his horse, he is to look for him, and when he hath found him in the inn, if he should not be enforced to pay for his meat, this would be a trick, to have his horse kept for nothing, and to have him brought by his servant to the inn. The owner

hath a benefit, meat for his horse, and for the which he ought to pay.

CURIA. The pleading here is not good, therefore they did advise the party to plead to issue, and so to go to trial, and so judgment may then be given upon the event; but as the case here is, Croke, Dodderidge, and Montague, clear of opinion for the defendant against the plaintiff.

HAUGHTON differed from them in opinion for the plaintiff.

COOK v. KANE ET AL., 13 Ore. 482.

(1886)

LORD, J. This suit was instituted by the plaintiff, as an innkeeper, to enforce a lien against a piano, put in his possession by the defendant as his guest, for a debt due for lodging and entertainment. By the facts stipulated, it is admitted that the relation of innkeeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano, and took it into his custody; that the piano was in fact the property of a third person, who had consigned it to the defendant to sell on commission, but that the plaintiff did not know it was the property of such third person, but received it in his character as an innkeeper and as the property of his guest. Upon this state of facts, we are to inquire whether the piano is chargeable with an innkeeper's lien for board and lodging furnished his guest.

At common law, the liability of an innkeeper for the loss of the goods of his guest is special and peculiar, and like that of the common carrier, is founded on grounds of public policy. It must not, however, be confounded with that of a common carrier; the liabilities, though similar, are distinct. (Clark v. Burns, 118 Mass. 275; Schouler on Bailments, 259.) Whatever controversy may exist in the judicial mind as to the true measure of the innkeeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional. (Schouler on Bailments, 261, and Notes; Coggs v. Bernard, 1 Smith's Lead. Cas. Amer. Notes 401.) Compelled to afford entertainment to whomsoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary

privileges. It gives him, as a security for unpaid charges, a lien upon the property of his guest, and upon the goods put by the guest into his possession. (Overton on Liens, 129.) Nor is the lien confined to property owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. (Schouler on Bailments, 292; Calye's Case, 1 Smith's Lead. Cas. 247; Manning v. Hollenbeck, 27 Wis. 202.) But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel.

In Broadwood v. Granerd, 10 Exch. 147, the innkeeper knew that the piano sent to the guest did not belong to him, and did not receive it as part of the guest's goods; and it was on that ground alone that he was held not entitled to his lien. But in Threfall v. Borwick, L. R. 7 Q. B. 210, where the innkeeper had received the piano as part of the goods of his guest, it was held that he had a lien upon it. MILLER, J., said: "When, having accommodation he has received the guest with his goods, and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive." LUSK, J., said: "I am of the same opinion. The innkeeper's lien is not restricted to such things as a traveling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods the guest brings with him and the innkeeper receives as his. If he has a lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner." To the same effect QUAIN, J., said: "There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveler may be ordinarily expected to bring with him. * * * The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters or obligations; and why not a pianoforte? If, therefore, the innkeeper be liable for the loss, it seems to follow he must also have a lien upon them. And if he has a lien upon them as against the guest,

the two cases cited (and there are more) show that if the things be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest." Upon appeal from the decision of this case, in Threfall v. Borwick, L. R. 10 Q. B. 210, it was held, affirming the decision, that whether the defendant, as innkeeper, was bound to take in the piano or not, having done so, he had a lien upon it. Although there are certain dicta not necessary to the decision in Broadwood v. Granerd, 10 Exch. 147, to the effect that the innkeeper was not bound to receive the piano, yet the real ground of the decision was based on the fact that the innkeeper knew that the piano sent to his guest was the property of a third person, and did not, therefore, receive it as part of his guest's goods, that the right to subject the piano to his lien was denied; but e converso, if he had not known the piano was the property of a third person, and had received it as the property of his guest, would not his lien have attached? It is not material whether the innkeeper is bound to receive such property, or not, although it is said the liability may be well extended, according to the advanced usages of society; yet if he does receive as the property of his guest, and thereby becomes liable for it, he must be entitled to his lien. (Threfall v. Borwick, supra.)

Whenever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession. It is true that the piano was shipped to the defendant in his name, but he brought it to the inn as his property, or at least it was brought there at his request and upon his order, and put in the custody and possession of the plaintiff as the property of his guest. It is admitted that the plaintiff received it as an innkeeper, and safely kept it as the property of his guest; nor is it doubted but what he would have been liable for its loss; and in such case, it is difficult to perceive upon what principle of law or justice he can be denied his lien. The judgment must be affirmed.

WALDO, C. J., concurring.

THAYER, J. (dissenting). * * * Upon the main question in the case, there is some doubt in view of the authorities upon the subject, though upon a common-sense view there would

not seem to be any. That the man Kane could pledge the appellant's piano for his own hotel bill, or in any way subject it to the payment thereof, would shock all sense of property right. The respondent's counsel, however, have cited numerous cases where such a lien has attached to the property of a third person, and I have no doubt but that such lien will in many cases attach to the property taken by the guest to the inn, at which he obtains accommodations, though he be not the owner of it. But in all such cases, it seems to me the property must derive some special benefit, or else the owner must have entrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn, and take the property with him there as his own; and I do not think the rule should extend further than this. In the case under consideration, it does not appear that the appellant ever knew that Kane was stopping at a hotel. He sent the piano to him at Baker City, to sell upon commission. It does not appear that the respondent furnished the entertainment upon the credit of the piano, or upon the supposition that it belonged to Kane. The latter might, and so far as I can see would, have continued a guest at the hotel the same whether the piano had been sent or not. It is not a case, as I view it, where the owner of the property has clothed another with the indicia of ownership, and a third person been deceived thereby into purchasing it, or giving credit upon the faith of such indication. It was purely a business transaction. The appellant was attempting to make sale of his property, and sent it to Kane for that purpose. The latter had no authority in the premises, except to exercise the special power conferred, and it does not appear but that the respondent had full knowledge of the facts, as the appellant alleged he did in his answer. I am inclined to believe that the burden of proof was upon the respondent to establish that he supposed the piano to belong to Kane, and that he entertained him upon the faith that such was the fact before he could claim a lien upon it for the hotel bill. The property of one man should not be taken for the debt of another against the former's consent, unless he had done some act or neglected some duty creating the liability. A party cannot be deprived of his ownership to property to satisfy the claim of another, unless he has in some form obligated himself to submit to it.

He must have agreed to it in terms, or have done some act directly or remotely authorizing it. I do not think that the pleadings and agreed facts in this case establish that the respondent had any lien upon the piano for the hotel bill against Kane, or for anything beyond the sum advanced by the respondent for the freight and transportation of it, unless it be for its storage; but the instrument has doubtless been used sufficiently to offset any sum for storage, and the appellant duly tendered the amount advanced as freight and transportation.

I think the decree should be reversed as to the appellant.

SINGER MANUFACTURING CO. v. MILLER, 52 Minn. 516; 55 N. W. 56.

Appeal by defendant, Christopher C. Miller, from a judgment of the District Court of Hennepin County, Canty, J., entered September 26, 1892, against him for $46.

Defendant kept a public inn in Minneapolis called the Hotel Grace. On December 1, 1890, Carl Van Raden, his wife and two children were received by defendant as boarders, at $15 per week. They remained until June 8, 1891. Among the effects which they brought to the inn was a Singer sewing machine. When they left, Van Raden owed $240.50 balance for their board. The defendant detained his goods, claiming a lien on them for this sum. The plaintiff, the Singer Manufacturing Company, then appeared and demanded the machine, claiming that it owned it and had leased it to Van Raden, and given him an option to buy it for $25. Defendant had not before heard of this claim, but supposed Van Raden owned the machine. He refused to give it up, and the company brought this action in a justice's court and at the trial proved its ownership, but was there defeated. Plaintiff then appealed to the District Court, where the facts were admitted to be as above stated. The judgment of the justice was reversed, and judgment entered for plaintiff, on the ground that Van Raden was a boarder and not a guest. The defendant appeals to this court.

VANDERBURGH, J. The court below found the facts as stipulated by the parties in the agreed statement of facts, as submit-

ted, and, as a legal conclusion, that the plaintiff was entitled to judgment. The defendant claimed an innkeeper's lien upon the chattel in controversy, a sewing machine, on the ground that it was brought to his hotel by a guest, who, it now appears, had contracted to purchase the same of plaintiff, but the title had not passed, though the possession had been delivered. The defendant, however, had no notice of the plaintiff's claim, and insists upon his lien thereon, with other goods of the guest, for the amount of his bill.

The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on goods in the possession of his guest infra hospitium, though they belong to a third person, provided the innkeeper has no notice of that fact.

If the innkeeper's liability would attach in case the sewing machine were lost or stolen, it would seem but just to hold that his lien attaches whenever there is a corresponding liability. Schouler, Bailm. § 292; Manning v. Hollenbeck, 27 Wis. 202; Threfall v. Borwick, L. R. 7 Q. B. 711.

The respondent, however, claims that the judgment may be supported on the ground that the findings of fact show that the party who brought the machine to defendant's hotel was received as a boarder, and remained there as such, and not as a traveler or guest. The evidence is not here, and so the question is not whether it would support a finding either way, but whether it appears from the stipulated facts, which are adopted as the findings in the case, that he was a guest. To entitle the defendant to assert his innkeeper's lien, he must have received the property as the goods of a guest, but this does not appear, and there is no such finding. It appears from the agreed statement that he received the party, his wife, and two children as boarders and lodgers, and that they continued to board and lodge with him for about six months at the rate of $15 per week, and that is all. This does not affirmatively establish the relation of guest and innkeeper, so as to subject him to the liability, or give him the rights incident thereto. Error must appear.

Judgment affirmed.

[1] Beale, Innkeepers, § 261, §§ 251-279: Gray's Cases on Property, Vol. I, pp. 168-181.

OLSON v. CROSSMAN, 31 Minn. 222; 17 N. W. 375.

(1883)

Appeal by defendant from an order of the municipal court of Minneapolis, refusing a new trial after a verdict of $143.69. The principal questions of fact litigated at the trial were (1) was the plaintiff's money stolen from him, while asleep at defendant's inn, where he had taken lodging for one night? and (2) if stolen, was the theft committed by one of the two companions who came to the inn with him, and occupied the same bedroom, or by a stranger, who was also assigned to and occupied the same bedroom? It was in evidence that the statutory notice for exemption from liability was not posted, but it appeared at the top of the page of the register where plaintiff signed his name, (and at the top of each page in the book) there was a printed notice that "all moneys, jewels, and other valuables must be left at the office; otherwise the proprietor would not be responsible." The court instructed the jury that this notice would not exonerate the defendant, unless brought to plaintiff's notice, so that he understood it and agreed to it.

GILFILLAN, C. J. Action by a guest against an innkeeper, to recover for money stolen from plaintiff in the inn while such guest. The common-law liability of an innkeeper is well stated in Lusk v. Belote, 22 Minn. 468, thus: "An innkeeper is by the common law responsible for the loss, in his inn, of the goods of a traveler who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy." * * * There was no pretense in this case that the loss was from the act of God or of the public enemy. The only claim that it was from plaintiff's negligence was based on the fact that the money might have been taken by one or other of two companions with whom plaintiff came to the inn, and with whom he occupied a room. The court correctly charged the jury that, if taken by one of these, the defendant would not be liable, but that, to absolve him on that ground, the fact that it was so taken must affirmatively appear.

While a theft from the guest by a companion whom he brings to the inn is imputable to the guest as his own negligence, he is not to be charged with negligence merely because the theft was committed by another guest of the inn whom he does not

bring there, even though, with his consent, he is placed to sleep in the same room with such other guest.

The statute (Gen. St. 1878, c. 124, §§ 21, 22) enables an innkeeper to limit his liability as to certain property of a guest, by keeping an iron safe and posting certain notices. The evidence does not indicate that defendant had complied with this. A notice at the head of the register of guests, or a verbal notice to the guest, not being such notice as the statute prescribes, is of no avail unless the guest consent to it, so as to constitute a contract limiting the innkeeper's liability. Of course, it would not amount to such a contract unless the guest's attention was called to it, so that he might be presumed to have understood and assented to it.

The evidence was sufficient to sustain the verdict.

Order affirmed.[1]

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4. TERMINATION OF RELATION.

O'BRIEN v. VAILL, 22 Fla. 627; 1 South. 137.

(1886)

The CHIEF JUSTICE delivered the opinion of the court:

On the 26th of March, A. D. 1885, plaintiff, O'Brien, went to the hotel of the defendant, E. E. Vaill, in the city of St. Augustine, and stopped there as a guest. The next day plaintiff paid his bill to the clerk in the office of the hotel and told him he would be gone for a few days, but would leave his baggage, which consisted of two trunks and a valise, until his return, and which he requested the clerk to take care of for him. Plaintiff left his baggage in his room, locked the door and gave the key to the clerk. Plaintiff told the clerk that on his return he would

[1] "If no regulation of the innkeeper's charges is made by statute the innkeeper is entitled, himself, to frame a schedule of rates, provided such rates are reasonable; or without having framed a formal schedule he may in any individual case make a reasonable charge. This may be a customary rate, or in the absence of a schedule of rates or any custom, it might be such an amount as the innkeeper pleases to charge, subject to the provision that it be not more than the entertainment is reasonably worth. When once the rate of compensation has been fixed it continues until a new arrangement is made." Beale, Innkeepers, § 243.

Limitation of responsibility by contract, notice and statutes. Beale, Innkeepers, §§ 211-215; Goddard on Bailments and Carriers, § 186.

board with him. On April 2d plaintiff returned and again became a guest of the hotel. The plaintiff's baggage had been removed by the proprietor to the main hall of the hotel. On inquiring for his baggage it was found that one of the trunks had been stolen.

It was in evidence that the front door opened into the office, and there was no entrance into the hall besides the entrance through the office; that when the house was not closed there was always some person in charge of the office, and when the hotel doors were closed there was always a watchman on duty. A former servant of the hotel was arrested for the theft, and confessing the crime, told the officers where they could find the trunk. Two hasps had been broken, and the most of the contents carried away. Vaill, the proprietor, refusing to pay O'Brien for his damage and loss, the latter brought suit.

The questions presented upon these facts are: 1st. Was Vaill, O'Brien having paid his bill and departed from the house but leaving his baggage saying he would return, liable to O'Brien under the law regulating the liability of an innkeeper to his guest for the loss of such baggage? Attorney for appellant has called to our attention the case of Adams v. Clem, 41 Geo. 65. In this case Mrs. Clem was the guest of the innkeeper, Adams; her trunk was carried to her room, and was marked with her name; she paid her bill, saying that a gentleman, whom she pointed out, would call in ten minutes for it and bring it to her in the country, to which Adams assented. She left the inn on Monday and no one called for the trunk until Friday, when it was found to be lost. The court held the innkeeper responsible.

The appellant also cites the case of McDonald v. Edgerton, 5 Barbour, S. Ct. 560. This decision is partly based on the case of Grinnell v. Cook, 3 Hill, 485. We think the court misconstrued Justice Bronson in the case of Grinnell v. Cook. In that case Judge Bronson drew a well-founded distinction in respect of the innkeeper's liability for property left by the guest, as to whether the innkeeper was to receive compensation for keeping the property during the absence of the guest. The guest had left a horse which required feed and attention, for which the innkeeper had a right to charge a reasonable compensation. In the case of McDonald v. Edgerton, the plaintiff left behind his coat and there was no compensation agreed on or

expected for keeping it. Leaving property for which a compensation for keeping was to be paid continued the relation of innkeeper and guest so far as that property was concerned.

We think the current of authority and the weight of reason is opposed to the conclusion reached by the Supreme Court of Georgia and the Supreme Court of N. Y. in 5th Barbour, supra.

The law imposes on the innkeeper an extraordinary liability for the protection of the baggage of his guest. He can avoid it only on the grounds of the loss being occasioned by the act of God, the public enemy, the misconduct of the guest, or the friends he brings with him. We can think of no other reason for the imposition of this liability upon the innkeeper than the profit he receives from entertaining his guest. When the traveler ceases to be his guest and the innkeeper ceases to derive a profit for his entertainment, the relation of innkeeper and guest have ceased as such and as a consequence their relative liabilities.

O'Brien, when he paid his bill and left the hotel, put an end to the relation of guest to the hotel-keeper. See Miller v. Peoples & Branum, 60 Miss. 819; Grinnell v. Cook, 3 Hill, 485.

The expectation to become a guest again at some other time did not continue the relation of innkeeper and guest.

The next question is, what was the relation of the parties after the cessation of the relation of innkeeper and guest as shown by the evidence? We think it was that of bailor and bailee, and that the defendant was a gratuitous bailee. The statement of the appellant that he expected to return to and board at the hotel could not be considered as a consideration for taking care of the baggage. A gratuitous bailee is liable only for gross negligence. There is nothing proved in the case that will justify us in the conclusion that defendant was guilty of such negligence in opposition to the finding of the referee.

The judgment is affirmed.

LAMOND v. THE GORDON HOTELS, LIMITED, (1897) 1 Q. B. 541.

(1897)

LORD ESHER, M. R. The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in and given rooms, and she stayed there for a period

of ten months. It was then intimated to her that the direction wished her to leave, but this she refused to do. Then notice was given to her requiring her to leave, and as she still refused, advantage was taken of her being out of the hotel, and her things were brought down and put outside, and on her return she was refused admittance.

The foundation of her action is that she was not allowed to stay on at the hotel. It was tried before the county court judge of Brighton without a jury, and he has arrived at certain conclusions of fact. He has found that the plaintiff was taken into the hotel as a traveler according to the custom of England, and to find that he must have also found that the hotel carried on business according to the custom, so that the proprietors were bound to take in everyone that came and asked for lodgings, if there was room for them. He finds that she stayed so long at the hotel that at last notice was given to her to leave; and his findings are equivalent to saying that, when notice was given, she was no longer a traveler, nor entitled to be treated as such under the custom. If this is a question of fact it is not subject to appeal.

The learned judge must have found that the proprietors of the hotel held it out to the public as an inn that would take in any traveler who came, provided there was room to do so. I think it is a question of fact what was the intention of those who carried on the business of the hotel, and the county court judge has stated what that intention was. Such a finding in this case does not affect the position of other hotels, and I think it is open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England—at any rate, such a matter would be a question of fact.

Then comes the question whether the plaintiff went to the hotel in the capacity of a traveler. That is also a question of fact which the county court judge has determined.

The plaintiff has brought this action relying on the custom of England, and not on the point raised now for the first time of a contract outside the custom. The question is whether it is the law that if a person goes to an inn in the character of a traveler that person retains the same character for any time however long. If so, the law would be contrary to the truth; and I will never

submit, unless compelled by an Act of Parliament, to say that a thing shall be deemed to be that which it is not. Therefore, the question whether a person has ceased to be a traveler seems to me again to be a question of fact, and mere length of residence is not decisive of the matter, because there may be circumstances which show the length of the stay does not prevent the guest being a traveler, as, for instance, where it arises from illness; but it is wrong to say that length of time is not one of the circumstances to be taken into account in determining whether the guest has retained his character of traveler. In my opinion there was in this case evidence of facts which justified the county court judge in saying that the plaintiff had ceased to be a traveler. If this is a question of fact, there is no appeal from the decision of the judge; but even if there were an appeal, I agree with the conclusion to which he came, that the evidence showed that the plaintiff was no longer a traveler. Her case, therefore, was not within the custom, and the relations between her and the innkeepers were not under the custom.

It is put as an objection that if the relation between them is changed the rights of the innkeeper against the plaintiff had ceased. I do not say whether this is so, but the argument is not sufficient to prevent the conclusion at which I have arrived, that the relation may be altered from the original one of traveler and innkeeper.

Then we were asked to imply a contract or agreement by both parties, by which the innkeeper contracted to lodge the plaintiff so long as she wished to stay, upon the same terms as those upon which she was taken in, so that she was under no obligation to stay an hour longer than she chose, but he was bound to keep her so long as she liked to remain. To my mind such a contract cannot have been the intention of the parties when the relationship commenced.

I think, therefore, there is no ground for disturbing the decision in this case, and the appeal must be dismissed.

LOPES, L. J. The law of England imposed exceptional liabilities on an innkeeper and gave him exceptional rights. But these exceptional liabilities and rights applied only as between the innkeeper and those persons who came to the inn in the character of travelers. This is shown clearly by the old form of writ against an innkeeper for refusing to supply food and lodging,

and from the old form of declaration, which will be found in Bullen and Leake's Precedents of Pleading. The question before us is, in what character was the plaintiff living at the inn when she recived notice to quit it? Was she there as a traveler, or had she ceased to be a traveler and remained in some other capacity? I cannot help thinking that this is a question of fact on which the finding of the judge was conclusive; but I do not desire to rest my judgment on that ground, which may be regarded rather as technical. In my opinion there is no such rule as is suggested, that a person who comes to an inn as a traveler and remains there must remain as a traveler. In my opinion the learned judge was right when he found that the plaintiff when she was required to leave had ceased to be a traveler, and that, therefore, the innkeeper was fully justified, after giving reasonable notice, in acting as he did. His judgment and that of the Divisional Court supporting it should be affirmed.

CHITTY, L. J. The plaintiff's claim is founded on the liability imposed by the general custom of England on the keeper of a common inn. There is no question of contract raised between the parties. The county court judge found, either as a question of fact or a mixed question of law and fact, that the defendants' hotel was an inn, and from that finding there is no appeal. Starting from that point, he considered whether the plaintiff, after being in the hotel for a period of ten months and considering all the circumstances of the case, still retained the character of a traveler which he attributed to her when she first went to the inn; and he decided, and this also may be a question of mixed fact and law, that she did not retain it. If this is a question of fact there is nothing more to be said on the appeal. The plaintiff's counsel, however, tried to treat it as a question of law; and turn his proposition about as you will, it still comes to this, that if a person once enters in an inn as a traveler he can remain there in that character as long as he pleases. With reference to this proposition, though there are many authorities on the question of the common-law liability of an innkeeper, no suggestion to this effect can be found, and in my opinion it is not the law. It may be a difficult question to determine in any case when the character of traveler ceases and that of lodger or boarder begins; but in this present case I think the judge was entitled on the evidence to come to the conclusion at which he

arrived, that the plaintiff had ceased to be a traveler. The custom of England does not extend to persons who are in an inn as lodgers or boarders, and the length of time that a guest has stayed is a material ingredient in determining such a question as was before the judge. If the character of traveler is continuous, it would follow that the plaintiff would have a right to reside at the hotel all her life, provided she conformed to the regulations and paid her bills, but that she could leave at any moment, while the landlord would be bound to provide lodging without any power to give notice to her to leave. This is a startling proposition, and, as it is moreover unsupported by authority, I cannot assent to it. It is hardly necessary to say anything about the suggested implied contract. The action was not founded on it, and the proposition itself will not bear examination. For these reasons I concur in the judgments already delivered.

Appeal dismissed.[1]

[1] Beale, Innkeepers, §§ 231-235; Moore v. Buch Co., 87 Cal. 483; Davis v. Gay, 141 Mass. 531; Horner v. Harvey, 3 N. M. 197; Howth v. Franklin, 20 Tex. 798; Clary v. Willey, 49 Vt. 55.

CHAPTER IX.

COMMON CARRIERS OF GOODS

1. Creation of Relation.

GISBOURN v. HURST, 1 Salk. 249.

(1710)

In trover upon a special verdict the case was, the goods in the declaration were the plaintiff's, and by him delivered in London to one Richardson, to carry down to Birmingham. This Richardson was not a common carrier, but for some small time last past brought cheese to London, and in his return took such goods as he could carry back in his wagon into the country for a reasonable price. When he returned home he put his wagon with the cheese into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house; and it was agreed per Cur., that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a further consideration, and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier, and the case in Cro. El. 596 is stronger. Two tradesmen brought their wool to a neighbor's beam which he kept for his private use, and it was held that could not be distrained.

FISH v. CHAPMAN, 2 Ga. 349.

(1847)

Action on a special contract of carriage.

By Court, NISBET, J. The plaintiff in error, William Fish, received at the then head of the Central Railroad from the agent of transportation on that road, certain packages of goods belonging to the defendants in error, Chapman & Ross, which by a special contract he promised to deliver in good order and condition at Macon, unavoidable accidents only excepted. In attempting to cross a stream his wagon was upset and the goods damaged. Chapman & Ross brought suit against him to recover the loss sustained by the injury done to the goods. * * *

The court below decided that the plaintiff in error under his contract with Chapman & Ross was a common carrier, to which opinion he excepts. The evidence upon this point is the contract and nothing more. It does not appear that carrying was his habitual business; all that does appear from the record is, that he undertook upon a special contract, and upon this occasion, to haul on his own wagon for a compensation specified, the goods of the defendants from the then terminus of the Central Railroad to the city of Macon. Does such an undertaking make him a common carrier? That is the question, and we are inclined to answer it in the negative. A common carrier is one who undertakes to transport from place to place for hire, the goods of such persons as think fit to employ him. Such is a proprietor of wagons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods. See Mr. Smith's able commentary on the case of Coggs v. Bernard, 1 Smith's Lead. Cas. 369, 7th Am. ed.; Forward v. Pittard, 1 T. R. 27; Morse v. Slue, 2 Lev. 69; S. C., 1 Vent. 190; S. C., Id. 238; Rich v. Kneeland, Cro. Jac. 330; Maving v. Todd, 1 Stark. 72; Brooke v. Pickwick, 4 Bing. 218. Railway companies are common carriers: Palmer v. Grand Junction Railway Co., 4 Mee. & W. 749.

"Common carriers (says Chancellor Kent) undertake generally and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, and with or without a special agreement as to price:" 2 Kent, 598. "It is not (says Mr. Justice Story) every person who undertakes to carry goods

for hire, that is deemed a common carrier. A private person may contract with another for the carriage of his goods and incur no responsibility beyond that of an ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. To bring a person under the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business and not as a casual occupation pro hac vice." Story on Bail., sec. 495. A common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying: Jackson v. Rogers, 2 Show. 327; Riley v. Horne, 5 Bing. 217; Lane v. Cotton, 1 Ld. Raym. 646; Edwards v. Sherratt, 1 East, 604; Batson v. Donovan, 4 Barn. & Ald. 21; 2 Kent, 598; Elsee v. Gatward, 5 T. R. 143; Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133; Jencks v. Coleman, 2 Sumn. 221; Story on Bail. 322, 323; Patton v. Magrath, Dudley's L. and Eq. 159, 31 Am. Dec. 552.

It will be seen hereafter we hold that according to the common law, as of force in this country in 1776, a common carrier cannot vary or limit his liability by notice or special acceptance, and shall advert to this subject again. For the present we state the proposition broadly, that he is in the nature of an insurer of the goods intrusted to his care, and is responsible for every injury sustained by them occasioned by any means whatever, except only the act of God and the king's enemies: 1 Inst. 89, Dale v. Hall, 1 Wils. 281; Covington v. Willan, Gow. 115; Davis v. Garrett, 6 Bing. 716; 2 Kent, 597; Coggs v. Bernard, 2 Ld. Raym. 918; Forward v. Pittard, 1 T. R. 27; Trent Nav. Co. v. Wood, 3 Esp. 127; Riley v. Horne, 5 Bing. 217. It is from these definitions, and from the two propositions stated, that we are to determine what constitutes a person a common carrier. I infer then that the business of carrying must be habitual and not casual. An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own state owning a wagon and team, who do not occasionally con-

tract to carry goods. It would be contrary to reason, and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier, who might once a year, or oftener at long intervals, contract to haul goods from one point in the state to another. Such a rule would be exceedingly inconvenient to the whole community, for if established, it might become difficult in certain districts of our state to procure transportation.

The undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, by his known habitual continuance in this line of business. He must thus assume to be the servant of the public, he must undertake for all people. A special undertaking for one man does not make a wagoner, or anybody else, a common carrier. I am very well aware of the importance of holding wagoners in this country to a rigid accountability; they are from necessity greatly trusted, valuable interests are committed to them, and they are not always of the most careful, sober, and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we cannot and wish not to escape from. To guard this point, therefore, we say, that he who follows wagoning for a livelihood or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a common carrier and subject to all his liabilities. One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character. By this test was Mr. Fish a common carrier? There is no evidence to make him one but his contract with Chapman & Ross. Suppose that after executing this contract, another application had been made to him to carry goods, which he refused, could he be made liable in damages for such refusal upon this evidence? Clearly not. There is not a case in the books, but one, to which I shall presently advert, which would make him liable upon proof of a single carrying operation.

The extent of his liability, and his inability to vary that liability by notice or special acceptance, is another test. A common carrier is liable at all events, but for the act of God and the king's enemies; and he cannot limit or vary that liability. Whereas a carrier for hire in a particular case is only answerable for ordinary neglect, unless he by express contract assumes the risk of a common carrier; his liability may be regulated by his contract. We do not think this undertaking would give to Mr. Fish that character which would preclude him from defining his liability in any other contract. By this contract he may be liable pro hac vice as a common carrier, for that is a different thing. Upon these views we predicate the opinion, that the plaintiff in error was not a common carrier. From the way in which the opinion of the court is expressed in the bill of exceptions, I am left somewhat in doubt whether the able judge presiding in this cause intended to say that the plaintiff in error was a common carrier, or that under his contract he was liable as such. If the former, we think he erred; and if the latter, as we shall more fully show, we think with him. In either event we shall not send the case back; for if he meant to say that the plaintiff upon general principles was a common carrier, thinking as we do, that he is liable under this contract as such, he will not be benefited by the case's going back.

In conflict with these views, it has been held in Pennsylvania, that "a wagoner who carries goods for hire, is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment:" Gibson, C. J., in Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 464. This decision no doubt contemplates an undertaking to carry generally, without special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be but little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient: See Story on Bail., secs. 457, 495; Bac. Abr., Carrier, A.; Robinson v. Dunmore, 2 Bos. & Pul. 416; Hodgson v. Fullarton, 4 Taunt. 787; Jones' Bail., 121; Satterlee v. Groat, 1 Wend. 272; Hatchwell v. Cooke, 6 Taunt. 577; 2 Kent, 597. Assuming, then, that Mr. Fish was not a common carrier, what is he? This is a bailment for hire, "locatio operis

mercium vehendarum;" the fifth in the learned classification of bailments, made by Holt, C. J., in Coggs v. Bernard, 2 Ld. Raym. 918. Mr. Fish is a private person contracting to carry for hire. The next question is, what are his liabilities? And this brings us to the main point of error charged upon the court below, and that is, that it erred in ruling that acording to his contract the plaintiff in error was liable as a common carrier. In all cases of carrying for hire by a private person, we state that he is bound to ordinary diligence and a reasonable exercise of skill, and is not responsible for any losses not occasioned by ordinary negligence, unless he has expressly, by the terms of his contract, taken upon himself such risk: Story on Bail., sec. 457; Coggs v. Bernard, 2 Ld. Raym. 909, 917, 918; Hodgson v. Fullarton, 4 Taunt. 787; Hatchwell v. Cooke, 6 Id. 577; 2 Marsh. Ins. 293; Jones on Bail. 103, 106, 121; 1 Bell's Com. 461, 463, 467; Robinson v. Dunmore, 2 Bos. & Pul. 416; Brind v. Dale, 8 Car. & P. 207; 2 Kent, 597.

In this case there is a special contract defining the party's liability, and he does not, therefore, come under the rule last stated; he is liable according to his contract. There are two things to be carefully noted in it, to wit: 1. The undertaking of the bailee (having, as the receipt expresses it, received the goods in "good order and condition"), to deliver them "in like good order and condition;" 2. The qualification of the liability of the bailee, which is expressed in these words, to wit, "unavoidable accidents only excepted." As we understand it, the contract means that the plaintiff in error will deliver the goods in good order and condition, unless prevented by unavoidable accident. If the exception were out of the contract, what then would be the liability of Mr. Fish? Upon the authority of the case of Robinson v. Dunmore, 2 Bos. & Pul. 416, I should be inclined to hold that the undertaking to deliver the goods in good order and condition is equivalent to a warranty to carry them safely, or to deliver them safely. If it is, Mr. Fish, according to that case, would be liable as a common carrier: See Story on Bail., sec. 457; Robinson v. Dunmore, 2 Bos. & Pul. 416, supra.

But we do not rest our decision upon this view of the contract; we look at that with the exception in it. What, then, is the effect of the exception? We think it is to make him liable

at all events, and for everything except for unavoidable accidents. It remains, then, to inquire into and determine what is the legal meaning and effect of these words. And, first, it may be material to say, that the word unavoidable is not the word usually used in the books in this connection, but inevitable. And, further, to say, that these words are in legal as well as common parlance, synonymous. Unavoidable accidents are, in our opinion, the acts of God. The latter words express the same acts, and no more than the former; the two phrases mean the same thing: See Story on Bail., secs. 25, 511; 2 Kent, 597.

What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant, any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness: Story on Bail., sec. 25; 2 Kent, 597. The act of God excludes all idea of human agency: McArthur and Hurlbut v. Sears, 21 Wend. 190. In this case it is said, "No matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled, or the force by which it is overcome be inevitable, yet, if it be the result of human means, the carrier is responsible:" See also Backhouse v. Sneed, 1 Murphy, 173; 2 Bailey, 157; Id. 421. As the exception in this contract extends only to unavoidable accident, or acts of God, and does not embrace the king's enemies, the bailee could not be protected from liability of losses occasioned by them. Even if the goods had been destroyed by the public enemy, he would have, in that event, been liable. The liability of common carriers goes even further; for if goods committed to them are lost by their neglect, through the agency of natural causes which are in themselves irresistible, they are liable; so rigid and severe are the obligations and duties of this common but not very well understood calling. Our opinion is, then, that the exception of unavoidable accidents excludes all other exceptions in this case, "expressio unius est exclusio alterius."

And that Mr. Fish was liable at all events and on every account, but for losses occasioned by unavoidable accidents; that unavoidable or inevitable accidents are the same with the acts of God; and as common carriers are liable for losses on every account but for the acts of God and the king's enemies, so,

therefore, is his liability the same as that of a common carrier, except in so far as it is greater in this, that he is not, by his contract, protected as the common carrier is at common law, against losses caused by the public enemy. The upsetting of the wagon on a decayed bridge across a stream, which was the accident which occasioned the loss in this case, is not, in our judgment, an unavoidable accident. We therefore find no error in the court in holding that Mr. Fish was on his contract liable as a common carrier. With these views of this contract, we do not conceive that it is at all important to say a word upon the question of negligence. * * *

Anterior to 1776, the common carrier was an insurer for the delivery of goods entrusted to him, and liable for losses occasioned by all causes except the act of God and the king's enemies, and without the power to limit his responsibility. That this was the law, is proven by the numerous authorities which I have before referred to. No adjudication before that time had relaxed its stringent but salutary severity. It is of consequence to establish this fact, because the common law, as it was usually of force before the revolution, is made obligatory upon this court by our adapting statute. It is said by Mr. Story, that Lord Coke recognized the right of modification, in a note to Southcote's Case; and also, that this right was admitted in Morse v. Slue, 1 Vent. 238. These are dicta which recognized the right before the era of 1776. And these are not adjudications—mere dicta, unsupported by authoritative decisions—they reverse nothing, establish nothing. Mr. Story does not himself claim that there was any modification of the rule before that era. He does say, that the right to modify their common law liability "is now (1832) fully recognized:" Story on Bail., sec. 549. All the cases (and they are numerous) in support of his statement, are since our revolution. We do not, however, question that statement. Chancellor Kent says: "The doctrine of the carrier's exemption by means of notice, from his extraordinary responsibility, is said not to have been known until the case of Forward v. Pittard, 1 T. R. 27, in 1785, and it was finally recognized and settled by judicial decision, in

The saying to which the chancellor has reference was made in 1818 by Burrough, J., in Smith v. Horne, 8 Taunt. 144, and Nicholson v. Willan, 5 East, 507, in 1804:" 2 Kent, 606.

The saying to which the chancellor has reference was made in 1818 by Burrough, J., in Smith v. Horne, 8 Taunt. 144, and in this: "The doctrine of notice was never known until the case of Forward v. Pittard, 1 T. R. 27, which I argued many years ago." "I lament that the doctrine of notice was ever introduced into Westminster Hall." The case then of Forward v. Pittard is the first in which the doctrine of notice is recognized according to Mr. Justice Burrough, and that was in 1785. It was not until 1804 that it was finally settled by judicial decision in Nicholson v. Willan, 5 East, 507. Twenty-eight years after the Declaration of Independence, the question of notice in all its bearings was reviewed with great learning and ability in Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455. I refer to that case now simply for the purpose of saying that the learned judge in that opinion declared "that the doctrine that a carrier may limit his responsibility by notice, was wholly unknown to the common law at the time of our revolution." Thus we think it is made manifest, that in 1776, by the common law, a carrier could not limit or modify his extraordinary responsibility by notice. That it has been allowed since that time we admit, and to this point see Nicholson v. Willan, 5 East, 507; Clay v. Willan, 1 H. Bl. 298; Harris v. Packwood, 3 Taunt. 264; Evans v. Soule, 2 Mau. & Sel. 1; Smith v. Horne, 8 Taunt. 146; Batson v. Donovan, 4 Barn. & Ald. 39; Riley v. Horne, 5 Bing. 217; Bodenham v. Bennett, 4 Price, 34; Down v. Fromont, 4 Camp. 41. Still, however, in England, by common law, since the Revolution, a carrier cannot by special agreement exempt himself from all responsibility, so as to evade altogether the policy of the law; he cannot exempt himself from liability in case of gross negligence and fraud: Story on Bail., sec. 549; Riley v. Horne, 5 Bing. 218; S. C., 2 Moo. & P. 331, 341; Sleat v. Fagg, 5 Barn. & Ald. 342; Wright v. Snell, Id. 350; Birkett v. Willan, 2 Id. 356; Beck v. Evans, 2 Camp. 267; S. C., 16 East, 244; Smith v. Horne, 4 Price, 31; S. C., 2 Moore, 18; Newborn v. Just, 2 Car. & P. 76. "It is perfectly well settled (we quote from Kent) that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants:" 2 Kent, 607. The notices which are allowed in England since the Revolution, go only the length of protecting the carrier from that responsibility which belongs to him as an insurer.

A distinction is sought to be drawn in some of the books between a notice carried home to the knowledge of the bailor and a special acceptance or contract. I cannot see that there is any difference. A notice contains the terms and conditions upon which the carrier will serve the public, or some limitation of his extraordinary responsibility, which when known and acted upon by his customer, is a contract, as much so as if the same stipulations were made by a separate contract with each individual customer. The only difference is in the mode of proof; the rule of evidence is different, and that is all. It has been so decided, particularly in New York: Gould v. Hill, 2 Hill (N. Y.), 624; Cole v. Goodwin, 19 Wend. 281, 32 Am. Dec. 470.

It may be safely asserted that the American decisions, with scarcely an exception, sustain the old common-law doctrine. Mr. Wallace, in his notes to Smith's Leading Cases, holds the following language: "That it is possible for a common carrier by either a general notice or a special acceptance to limit his extraordinary liability, is a position which it is believed is not supported by the authority of any adjudged case in the United States:" 1 Smith's Lead. Cas. 183. The reverse doctrine is permanently settled in New York. We, then, adhere to the sound principles of the common law, sustained by the courts of our own union, and hold notices, receipts, and contracts, in restriction of the liability of a common carrier, as known and enforced in 1776, void, because they contravene the policy of the law: Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Camden and Amboy Transportation Company v. Belknap, 21 Id. 355; Cole v. Goodwin, 19 Id. 251, 32 Am. Dec. 470; Gould v. Hill, 2 Hill (N. Y.) 623; Alexander v. Greene, 3 Id. 9, 20; Story on Bail., 4th ed., 558, note; Atwood v. Reliance T. Co., 9 Watts, 87; Barney v. Prentiss, 4 Harr. & J. 317, 7 Am. Dec. 670; Jones v. Voorhees, 10 Ohio, 145; 2 Kent, 608, note. The British parliament, declaring the sense of the British lawyers to a very great extent, has restored the old law as to the responsibility of carriers. See stat. 11 Geo. IV., and stat. 1 Wm. IV., c. 68; for these statutes, consult 1 Harr. Dig. 551, tit. Carriers, 4th ed., 1837; also, Hollister v. Nowlen, 19 Wend. 243, 249, 32 Am. Dec. 455; and Smith's Mercantile Law, 233, 238, 2d Lond. ed., 1838.

The only modification of the common-law rule which we admit, is the right of the carrier, by notice brought home to the

passenger, to require the latter to state the nature and value of the property bailed, and to avail himself of any fraudulent acts or sayings of the bailor: Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470; Camden, etc., R. R. Co., v. Belknap, 21 Id. 354; Id. 153; Gould v. Hill, 2 Hill (N. Y.), 623. The reasons given by eminent jurists in support of the law of carriers, as we now hold it, are entirely satisfactory, and apply with far greater force now than when they were announced. Holt, C. J., in his opinion in Coggs v. Bernard, an opinion which alone has made him immortal, calls it, "a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealings, for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And that is the reason the law is founded upon in that point."

In Forward v. Pittard, 1 T. R. 27, Lord Mansfield says: "The law presumes against the carrier, to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled." It is not the reward which he gets by virtue of his contract which charges him as an insurer; it is true, that he is paid for his risks, but it is because he is in fact a public officer, in whose fidelity the public is compelled to trust, and whose infidelity it is so difficult, if not impossible, to establish by proof. The place of the carrier is a public office. In Ansell v. Waterhouse, 2 Chit. 1, Holyroyd, J., said: "This action is founded on what is quite collateral to the contract, if any; and the terms of the contract, unless changing the duty of a common carrier, are in this case quite immaterial. The declaration states an obligation imposed upon him by law. This is an action against a person who, by ancient law, held as it were a public office, and was bound to the public. This action is founded on the general obligation of the law." The reasons of the rule may be summed up as follows:

The carrier is recognized as a public agent; for his services he is entitled to ample reward, and is not bound to perform them unless it is paid or tendered; ex necessitate rei the most unqualified confidence is reposed in him; this confidence is in-

dispensable to the exercise of his vocation. From the nature of his calling, the utmost facilities are at his control for fraudulent conduct and collusive combinations, and for the same reason his frauds or combinations are difficult of proof. He enters into this line of business voluntarily, and with a knowledge of all its hazards, for he is justly presumed to know the laws of the land. The law, then, looking to the great interests of commerce, and guarding with parental care the rights of the greatest number, makes him an insurer of the property delivered to him. With what resistless force does not this reasoning apply to the ten thousand incorporations of our own country? Strong in associated wealth; strong in the mind which is usually enlisted in their management; and yet stronger, far stronger, in the large immunities and extraordinary privileges with which their charters invest them. If these, as carriers, can vary their liability at all, at what limits does the power stop? Where are its boundaries? Outside of the obligations which their charters impose, there would be neither bounds nor limitations; the citizens would be at their mercy, bound by their power and subject to their caprices. The inconveniences of the modern English rule are well portrayed by Bronson, J., in his opinion in Hollister v. Nowlen, (infra).

Well might the judges lament that the doctrine was ever admitted into Westminster Hall: See 1 Bell's Com. 474.

Thus, whether satisfactorily or not, have we disposed of the real questions made in this cause. Let the judgment of the court below be affirmed.[1]

MICHIGAN, ETC., RAILROAD COMPANY v. SHURTZ,

7 Mich. 515.

(1859)

Error to St. Joseph circuit, where action was brought by Shurtz against the railroad company, for the value of certain wheat.

The declaration was in substance as follows:

First count. That defendants, being common carriers, received at White Pigeon 83 55-60 bushels wheat of plaintiff, to be taken

[1] Hollister v. Nowlen, 19 Wend. (N. Y.) 234.

care of, and safely and securely carried and conveyed to Toledo, and there delivered to plaintiff, for a consideration to be paid, but that, not regarding their duty as such carriers, they so carelessly and negligently behaved and conducted themselves with respect to such wheat, that the same was wholly lost to plaintiff.

Second count. Similar to the first, except that it alleged the undertaking to carry to such point on defendant's road as plaintiff should designate when defendants should be ready to carry the same, they not then being prepared so to do.

Fourth count. That defendants, as common carriers, received said wheat, and gave therefor the following receipt:

"Mich. South. Railroad,

"White Pigeon, Nov. 9, 1854.

"Received of S. Cotterman, for account of Fred. Shurtz, 83 55-60 bushels of wheat to be forwarded to ————, without further liability after lake shipment or loss by fire.

"A. A. Bean, Agent,

"Per C. Dunwell."

That according to the custom of defendants the place of destination of property was usually left blank in such receipts when the property was to be carried to Toledo, whereby they undertook to carry to Toledo. Breach as in the first count.

Plaintiff (below) gave in evidence the receipt above copied, and proved that a portion of the wheat therein mentioned remained in the warehouse of defendants on December 24th, 1854, when said warehouse was destroyed by fire. He was also permitted by the circuit judge, under objection that no such fact was alleged in his declaration, to give evidence tending to prove that before the fire he had directed the wheat to be sent forward to Toledo—the judge holding the evidence proper under the first count.

Plaintiff also, under exception, introduced evidence tending to prove the following facts: That defendants, at the date of the receipt, had insufficient facilities for forwarding grain received by them; and that it was customary to give receipts for grain without specifying the place of destination, even when it was known to both parties. They also gave some evidence which they claimed tended to show negligence on the part of the company's servants, in the burning of the warehouse.

The jury under the charge of the court returned a verdict for plaintiff.

MARTIN, C. J.: The principal question presented by this case, is whether the railroad company are liable as common carriers for the wheat deposited in their warehouse, to await orders for transportation, and a determination of what shall be its destination. We think they are not, nor should they be. By their charter the company have no right to charge as warehousemen, for storage of goods awaiting transportation; but this disability does not of itself create any liability. When the goods are delivered to be transported to a specified point, the liability of the company as carriers commences immediately; but if they are deposited to await orders—if the company cannot carry them because ignorant of the contemplated destination, or because no destination has been concluded upon by the owner, it would be gross injustice to hold them subject to the extraordinary liabilities of common carriers, while thus awaiting the determination of their owner. While the wheat was lying in their warehouse awaiting the determination of Shurtz as to its destination, the company cannot be regarded as anything more than gratuitous bailees, and are liable only as such. If the intention of Shurtz cannot be clearly seen to have been that it should be transported to any particular place, how can they be seen to be carriers of it? Can the company be carriers of a thing not to be carried? But when Shurtz had determined to what point he would have his wheat transported, and had notified the company of such determination, then their liability as carriers commenced, and it became their duty to forward it without delay. This is the obligation of their charter, and a want of facilities for transportation will not relieve them from that reliability.

There is no count in the declaration which will authorize a recovery for the destruction of the wheat, held by the company to await orders for its transportation, charging them as carriers. The theory of the first count of the declaration—and it is under that, that the court below held that this proof was admissible—is that the company were common carriers for hire, and that the plaintiff caused the wheat in question to be delivered to them to be conveyed to Toledo; and that this they undertook to do; but so carelessly and negligently conducted, that the wheat was destroyed. And a like theory, viz., that the wheat was in the

company's possession, subject wholly to their control, or to transportation at their convenience, and according to their ability, runs through and characterizes all the other counts, except one, in the declaration.

This fundamental error renders it unnecessary to consider the other questions raised by the bill of exceptions.

The judgment should be reversed, and a new trial ordered.

The other justices concurred.

MERRITT v. OLD COLONY AND NEWPORT RAILWAY COMPANY, 11 Allen (Mass.) 80.

(1865)

Tort against a railroad corporation to recover for damages done to a caloric engine sent by the plaintiff to the depot of the defendants in South Boston for transportation to South Abington, while being loaded upon the cars.

The judge instructed the jury that the defendants' liability as common carriers commenced when the engine was delivered to and accepted by them for the purpose of transportation; that until such delivery the truckman, who was also a common carrier, would be liable; but after such delivery and acceptance the defendants would be liable for the negligence of those employed by them to load or transport the engine; that it was for the jury to determine from the evidence whether there had been such delivery and acceptance, and that in order to constitute such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine, for the purpose of transportation.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

DEWEY, J. The instructions given were correct, and sufficiently full to guide the jury as to their verdict.

The plaintiff introduced evidence tending to show that the engine was carried by a truckman to the freight station of the defendants, to be transported to South Abington; that notice of its arrival was given to the freight agent, who directed the truck-

man to drive near a derrick by a certain track at which heavy articles were laden upon the cars, and there wait till the men came, when they would run in a car and put it on board; that the truckman followed this order, and the men came, ran in a car, and commenced loading the engine, the agent of the defendants superintending and directing the work, and the truckman being present also, giving assistance to prevent the chain which had been placed around the engine from slipping. The mode of placing the engine upon the cars by means of a derrick was an arrangement of the defendants, and they provided the derrick for that purpose.

The evidence on the part of the defendants, as to the superintendence and control of the operation of removing the engine from the sled of the truckman to the cars, conflicted with that of the plaintiff; and this was submitted to the jury. It became necessary to ascertain at what point, as respects the rights of the bailor, the truckman's responsibility for the safe transportation of the engine ceased, and when the same was cast upon the defendants. The court properly ruled that it was when the engine was delivered to and accepted by them for the purpose of transportation, and that in order to constitute such delivery and acceptance it must appear that the defendants had through their agent taken and assumed the charge and custody of the engine for the purpose of transportation. Story on Bailm. § 453.

Of course in deciding the question when the custody does thus attach, much will depend upon the manner in which they receive goods for transportation, the provision they make for raising heavy articles into their cars, and the active participation of the agent of the company in reference to the same.

As to warehousemen, it has been held that as soon as the goods arrive and the crane of the warehouse is applied to them to raise them into the warehouse, the liability of the warehouseman commences, and it is no defense that they are afterwards injured by falling into the street from the breaking of the tackle. Story on Bailm. § 445.

In the opinion of the court, the instructions were sufficiently full, and the further instructions asked were properly refused.

Exceptions overruled.

ALLEN ET AL. v. SACKRIDER ET AL., 37 N. Y. 341.

(1867)

This was an action by Elijah B. Allen and Walter B. Allen against Norman Sackrider and Frank Farnham, to charge the defendants, as common carriers, with damage to a quantity of grain, shipped by the plaintiffs in a sloop of the defendants.

The case was tried before a referee, who found as follows: "The plaintiffs, in the fall of 1859, were partners, doing business at Ogdensburgh; the defendants were the owners of the sloop Creole, of which Farnham was master. In the fall of 1851, the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinto to Ogdensburgh. In November, 1859, plaintiffs again applied to defendants, to make another similar trip for grain, and it was agreed at $100 for the trip. The vessel proceeded to the bay, and took in a load of grain, and, on her return, was driven on shore, and the cargo injured to the amount of $1346.34; that the injury did not result from the want of ordinary care, skill or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God. From these facts, my conclusions of law are that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendant liable as special carriers; and, therefore, the plaintiffs have no cause of action against them.

Judgment was, accordingly, entered upon the report, in favor of the defendants; and the same having been affirmed at general term, the plaintiffs appealed to this court.

PARKER, J. (after stating the case): The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They own a sloop; but it does not appear that it was offered to the public, or to individuals, for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers or had ever offered their services as such. This casual use of their sloop in transporting

plaintiffs' property, falls short of proof sufficient to show them common carriers.

A common carrier was defined, in Gisbourn v. Hurst (1 Salk. 249), to be "any man undertaking, for hire, to carry the goods of all persons indifferently;" and in Dwight v. Brewster (1 Pick. 50), to be "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." In Orange Bank v. Brown (3 Wend. 161), Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons, indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." (Story on Contracts, § 752 a.) The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of anyone who offers. "On the whole," says Prof. Parsons, "it seems to be clear, that no one can be considered as a common carrier, unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action, if he should refuse to carry for anyone who wished to employ him." (2 Pars. on Cont., 5th ed., 166, note.)

The learned counsel for the appellant, in effect, recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says, "The Creole was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly they were not common carriers; and the judgment should, therefore, be affirmed.

Judgment affirmed.

GROSVENOR v. NEW YORK CENTRAL RAILROAD CO., 39 N. Y. 34.

(1868)

The complaint in this action alleges that, in April, 1861, the plaintiff delivered to the defendant, at Clifton Springs, a cutter, to be carried by it to Buffalo, and paid the defendant therefor, which the defendant agreed to do, and that by the negligence of the defendant, it became wholly lost to the plaintiff. The answer denies these allegations. The servant brought the cutter by plaintiff's direction, to have it shipped to Buffalo, and arrived at the depot about six o'clock in the morning, and placed it on the platform of the freight house, next the railroad track, with one end next the freight house, and the other toward the track, and went back after the thills; that he returned in about an hour with them and stopped in front of the passenger depot, about six rods from the freight house, and saw the defendant's baggageman, Hall, who, at the time, was sweeping out the depot, and said to him, "There is some stuff to go to Buffalo." The cutter placed on the platform, as stated, would project over it nine inches. Two or three hours after it was left, a car in a passing train caught the cutter and broke it, and the first knowledge the agent had of its being there, was seeing it pass his office at the passenger depot on this car, broken.

At the close of the plaintiff's testimony, and at the close of the evidence, the defendant made a motion for a nonsuit, upon the ground that, upon the undisputed facts, the plaintiff was not entitled to recover, which motion was denied by the court, and an exception taken to the decision by the defendant.

The jury found a verdict for the plaintiff for $78.16, for which judgment with costs was entered. The defendant appealed to the General Term of that court, where the judgment was affirmed. The defendant thereupon appealed to this court.

MILLER, J. I am of the opinion that the court erred in refusing to nonsuit the plaintiff upon the trial. To render a party liable as a common carrier, it must be established that the property was actually delivered to the common carrier or to some person duly authorized to act on his behalf. The responsibility of the carrier does not commence until the delivery is completed. (Angell on Carriers, § 129; Story on Bailments, § 532.) It is not enough

that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person. (Packard v. Getman, 6 Cow. 757; Trevor v. U. & S. R. R. Co., 7 Hill, 47; Blancard v. Isaacs, 3 Barb. 388; 2 Kent Com. 604; 1 Pars. on Con. 654.) The liability of the carrier attaches only from the time of the acceptance of the goods by him. (Story on Bailments, § 533; 6 Cow. supra.) To complete the delivery of the property within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent. It appears in the case at bar that the cutter of the plaintiff was placed upon the platform of the defendant's freight house, by a servant of the plaintiff, the freight having been previously paid, to be transported to Buffalo. At the time when it was thus left, a baggageman in the defendant's employment, who was then engaged in sweeping out the depot, was notified that there was some freight to go to Buffalo in the noon train. The servant of the plaintiff testifies that he had seen this person receive and put freight on the cars, and at this time he apparently had charge of the depot, although the proof on the part of the defendant shows that another employe was the real freight agent, and the person with whom the contract was made for the carriage of the property, and that the baggageman had no authority to receive it. Upon this state of facts; I am inclined to think that the plaintiff had established sufficient prima facie to submit to the jury the question whether the baggageman was authorized to receive the property, and whether the notice to him was of itself sufficient. Persons dealing with railroad corporations, and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it, have ample authority to deal with them. It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation, and even although it subsequently appears that another employe was actually the agent having charge of his department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at lib-

erty to relieve themselves from responsibility, by repudiating their acts. So far then as this branch of the case is concerned, it was at least a question of fact to be submitted to the jury under proper instructions, whether the baggageman of the defendant, to whom it is claimed by the plaintiff the cutter was delivered, was the agent of the defendant; duly authorized to receive the same, and whether notice of its delivery was given to him as such agent. But, whether he was such agent, or the duty of receiving freight devolved upon another person, the defendant could not be held liable under any circumstances, without an actual and complete delivery of the property into the possession of the corporation, and under its control. This, I think, was not done. The undisputed testimony shows, that the cutter was placed upon the platform, and that within two or three hours afterward, it was carried away and broken to pieces by a passing train of cars. The fact that it was thus carried away evinces that it was carelessly exposed by the plaintiff's servant; that the destruction of the cutter was occasioned by his negligence, and that the delivery was not as perfect and complete as it should have been.

The accident would not have happened had the cutter been placed beyond the reach of passing trains. It was not enough that the agent was notified, to make out a valid acceptance and delivery. The place of delivery was important, and it was equally essential that due care should be exercised. Suppose the servant had left the cutter on the track of the railroad, and notified the agent, would the defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises, no surrender of the property into the possession of the agent. Until it was actually delivered, the agent was under no obligation to take charge of the property, even if notified. It is apparent that the plaintiff was in fault in not delivering the property to the defendant, and on leaving it in an exposed condition, which caused its destruction; and, having failed to establish this material part of his case, should have been nonsuited. As a new trial must be granted for the error stated, it is not important to examine the other questions raised and discussed.

Judgment reversed, and new trial granted, with costs to abide the event.

2. Obligation of Common Carrier.

a. Obligation to Serve all Shippers.

EXPRESS CASES, 117 U. S. 1, 6 Sup. Ct. 542.

(1886)

WAITE, C. J. These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. * * *

When the business began (about the year 1839) railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies. * * * Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. * * *

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger trains. It requires not only speed, but reasonable certainty

that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger.

The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. * * *

No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as

to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. * * *

The territory traversed by the railroads involved in these present suits is part of that allotted in the division between the express companies to the Adams and Southern Companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in a way that passengers and freight are carried. The contracts which these com-

panies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the states of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discrimination in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable.

The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contract, and no other companies have ever been admitted except by agreement. By the terms of their contract they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. * * *

The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payments of any amounts that may be found to be due, to dismiss the bills.[1]

[1] Acc. Sargent v. Boston & L. R. Co., 115 Mass. 416 (1874); Pfister v. Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886); Atlantic Ex. Co. v. Wilmington & W. R. Co., 111 N. C. 463; 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805 (1892). And see No. Pac. Ry. Co. v. Adams, ante, p. 451, and cases cited in note thereto.

Contra: Sandford v. Railroad Co., 24 Pa. 387, 64 Am. Dec. 667 (1855); New Eng. Ex. Co. v. Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31 (1869); McDuffee v. P. & R. Co., 52 N. H. 430, 13 Am. Rep. 72 (1873). And see 17 Green Bag, 570.

In Chicago, etc., R. Co. v. Pullman Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97 (1891) a question arose as to the validity of a

JOHNSON v. DOMINION EXPRESS CO. 28 Ont. 203.

(1896)

Action to compel defendant (Express Co.) to carry goods tendered to it, and for damages for refusal to carry. Defendant had a lower rate per pound for large parcels than for small ones. Plaintiffs planned to establish a business of collecting small parcels to put them together into large parcels, and to ship them by the defendant company to a point of distribution at the lower rate.

ROSE, J. * * * It seems to me that the question comes simply down to this: Did the defendant company hold itself out as a carrier to carry goods for persons in the position of the plaintiffs, and for the purposes for which the plaintiffs desired them to be carried? and, secondly, if it did, does the tariff rate or rates charged to others, on the evidence before me, establish that the amount tendered by the plaintiffs was a reasonable amount, or that the defendant company might not well charge for each parcel in a packed parcel according to its usual rates?

I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right absolutely to decline to carry parcels so packed for the plaintiffs; but I say I do not think the defendant ever intended to hold itself out to the public as the carrier of the goods of a rival express company, making use of its

contract giving the Pullman Company an exclusive right to run sleeping cars over the railroad. Harlan, J., said: "The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as defendants' lines were supplied with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them."

See, also, Del., L. & W. R. R. v. Kutter, 147 Fed. 51, 77 C. C. A. 315 (1906), contract for exclusive right to carry milk. (Green, Cases on Carriers, 532-3.)

credits and its facilities for doing business, to the aggrandizement of its rival and its own destruction. * * *

In my opinion, the action should be dismissed, with costs.[1]

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b. Obligation to Provide Reasonably Adequate Facilities.

AYERS ET AL. v. CHICAGO, ETC., R. R. CO., 71 Wis. 372.

(1888)

At the close of the trial the jury returned a special verdict to the effect (1) that at the times named plaintiffs were copartners at Reedsburg, engaged in buying and shipping live stock to the Chicago market for sale; (2) that at the times stated the defendant was a common carrier, and as such, engaged in the transportation of live stock, and accustomed to furnish cars for, and transport all live stock offered for, that purpose; (3) that one of its lines ran from La Valle and Reedsburg to Chicago; (4) that October 13, 1882, the plaintiffs, being fully apprised of the state of the Chicago market for live stock and prices, proceeded to buy therefor seven carloads of cattle, hogs, and sheep, four to be loaded at La Valle and three at Reedsburg; (5, 6, 7, 8, 9, 10, and 14) that the plaintiffs notified the defendant's agents, at the respective stations, October 13, 1882, to have such cars in readiness at such stations, respectively, October 17, 1882, and that such notices were reasonable, and such agents promised to order the cars and have them in readiness at the time; (11) that two cars were furnished at Reedsburg, October 17, 1882, and one October 19, 1882; (12) that the four were furnished at La Valle, October 19, 1882; (13) that the defendant furnished two as soon as it reasonably could, but five it did not; (15) that the plaintiffs received no notice before October 17, 1882, that the cars would not be furnished as ordered; (16, 17, and 18) that prior to that time, and with the expectation that the cars would be on hand as ordered, the plaintiffs had bought sufficient stock to load several cars, and had the same at said respective stations on the morning of October 17, 1882; (19) that the defendant, being able to furnish such cars, disre-

[1] What must be carried. 23 Harv. L. Rev. 212.
Excuses for not serving. 15 Harv. L. Rev. 571; 23 Harv. L. Rev. 212, 577-589.
For the English law of common carriers, see, 2 Ency. of Laws of Eng. 385-395.

garded its duty as a common carrier of live stock in not having the same on hand when ordered; (20) that, had the cars been so furnished, they would have arrived at Chicago on the morning of October 18, 1882; (21) as it was, two arrived there on Thursday, October 19, 1882, a. m., and five on Friday, October 20, 1882, at 5:45 p. m.; (22, 23, and 24) that the market value of hogs in Chicago, on Friday, October 20, was $7.36 per hundred, on Saturday, October 21, was $7.11, and on Monday, October 23, $6.81; (25, 26, and 27) that the loss on the hogs, by reason of depreciation of the market, was $140.08; that the total damages of the plaintiffs on all the stocks was assessed at $825.97, made up of the following items, to wit: Taking care of and feeding stock, $50; shrinkage on hogs, cattle, and sheep, $408.35; depreciation in value on hogs and sheep, $172.58; and interest on the above sums until the rendition of the verdict, $195.04. The defendant thereupon moved for judgment in its favor upon the verdict and record, which was denied. Thereupon the defendant moved to set aside the verdict, and for a new trial, upon the grounds that the verdict is against the weight of the evidence, and for errors of the court in its charge to the jury, and in its rulings on the trial, and because the damages were excessive, and contrary to the proofs, which motion was denied. Thereupon, and upon the motion of the plaintiffs, judgment was ordered in their favor on the special verdict for $825.97 damages and costs. From the judgment entered thereon, accordingly, the defendant brings this appeal.

CASSODAY, J. (after stating the facts): There is no finding of any agreement on the part of the defendant to have the cars in readiness at the station, on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said, "All right," he would try and get them; but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock, at their own expense and risk, and that they would assume all risk of injury

or damage that the animals might do to themselves, or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars, or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant, causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the station named, as ordered by the plaintiffs, and in the absence of any contract to do so. * * * It is, moreover, in effect, admitted that the defendant was at times, when able to do so, engaged in the transportation of live stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to, and did, submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed, also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year, for the shipment of similar live stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument. We are therefore forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally

as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson v. Railway Co., 61 Wis. 601, and is supported by the logic of numerous cases. Railroad Co. v. Bank, 123 U. S. 727, 8 Sup. Ct. Rep. 266; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. Rep. 497, 122 Amer. & Eng. R. Cas. 13; Lindsley v. Railroad Co., (Minn.) 33 N. W. Rep. 7; Evans v. Railroad Co., 111 Mass. 1422; Kimball v. Railroad Co., 26 Vt. 247; 62 Amer. Dec. 567; Rixford v. Smith, 52 N. H. 355; Clarke v. Railroad Co., 14 N. Y. 570, 67 Amer. Dec. 205; Railroad Co. v. Henlein, 52 Ala. 606; Baker v. Railroad Co., 10 Lea. 304, 16 Amer. & Eng. R. Cas. 149; Railroad Co. v. Lehman, 56 Md. 209; McFadden v. Railway Co., (Mo.) 4 S. W. Rep. 689, 3 Amer. & Eng. Cyclop. Law, pp. 1-10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." Johnson v. Railroad Co., 4 Exch. 372. Being a common carrier of live stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, with jeopardizing its other business as such common carrier. Railway Co. v. Nicholson, 61 Tex. 491; Railroad Co. v. Erickson, 91 Ill. 613; Ballentine v. Railroad Co., 40 Mo. 491; Guinn v. Railway Co., 20 Mo. App. 453. Whether the defendant could with such diligence so furnish upon the notice given was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon nor expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence, under the circumstances then existing, to furnish the cars without interfering with previous or-

ders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different states. Along each and all of these lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company, to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be, in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirements of such fair and general distribution and uniform vigilance are not only mutually beneficial to producers, shippers, carriers, and purchasers, but to business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligations to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited. The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler v. State, 58 Wis.

46, 16 N. W. Rep. 42. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem v. Blake, 16 Wis. 102; Beckman v. Henn, 17 Wis. 412; Noonan v. Ilsley, 21 Wis. 144; Railroad Co. v. Bacon, 30 Ill. 352; Brown v. Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders, or superior obligations. The ability of the defendant to so furnish with ordinary diligence, upon the notice given, upon the principles stated, was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper, within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same. The court very properly charged the jury, in effect, that if all cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did—to wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Railroad Co. v. Erickson, supra. The trial court, however, refused to so limit

the recovery, but left the jury at liberty to include such damages down to Monday, October 13, 1882. For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BAKER v. BOSTON & M. R. CO., 74 N. H. 100.

(1906)

Case for negligence. The questions of law are raised by the plaintiff's demurrer to the plea.

BINGHAM, J. The defendants are engaged in the carrying trade as common carriers of freight and passengers. Whiting & Sons are milk contractors who buy and sell milk, buying it of the producers on the line of the defendants' road and distributing it at different points along the same. In consideration of the defendants agreeing to furnish Whiting & Sons with cars provided with icing facilities for the transportation of their milk, Whiting & Sons agreed to pay them a stipulated sum, to furnish ice, to provide men to do the work incident to handling and caring for the milk while in transit, and to idemnify the defendants against the claims of any of the employes of Whiting & Sons "on account of personal injury or damage to property received while on the cars or premises" of the road. In view of the provisions of this contract, and, in consideration of his future employment and other considerations, the plaintiff, an employe of Whiting & Sons engaged to handle and care for the milk, agreed with Whiting & Sons not to make or prosecute any claim against the defendants on account of injuries received by him during his employment and to idemnify Whiting & Sons against all liability on account of any such claim. The plaintiff was injured through the defendants' negligence while on their train in the performance of his duties under the contract, and the question we are called upon to consider is whether these contracts are valid and constitute a defense to this action.

The defendants say that both contracts are valid, and that they should be permitted to avail themselves of the benefits of the plaintiff's contract with Whiting & Sons to avoid circuity of action. * * *

Their contention as to this matter is simply this: That the furnishing of cars without icing facilities would have been a full compliance with their public duty as common carriers, and that Whiting & Sons, as shippers of milk, could not have required them to furnish cars with icing facilities for its transportation. In answer to this it may be said that, as incident to their business of common carriers of milk, it was the defendants' public duty to provide reasonable facilities for its reception and delivery, including care during transportation. Flint v. Railroad, 73 N. H. 141, 144, 59 Atl. 938; Sager v. Railroad, 31 Me. 228, 1 Am. Rep. 659; Steinweg v. Railway, 43 N. Y. 123, 3 Am. Rep. 673; Welsh v. Railroad, 10 Ohio St. 65, 75 Am. Dec. 490; Beard & Sons v. Railroad, 79 Iowa, 518, 520, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Potts v. Railway, 17 Mo. App. 394; Merchants' Dispatch Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; 2 Hutch. Car. (3d Ed.) §§ 495-497; Ray, Fr. Car. § 4, and cases there cited. "A railway company is bound to provide cars reasonably fixed for the convenience of the particular class of goods it undertakes to carry. It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport. He must protect his goods from destruction or injury by the elements, from the effects of delay, from any source of injury which, in the exercise of care and ordinary intelligence, may be known or anticipated." Ray, Fr. Car. supra. He must "provide all suitable means of transportation and exercise that degree of care which the nature of the property requires." Smith v. Railroad, 12 Allen (Mass.) 531, 534, 90 Am. Dec. 166.

In addition to the duty imposed upon the defendants by the common law, our statutes provide that "the proprietors of every railroad shall furnish to all persons reasonable and equal terms, facilities, and accommodations for the transportation of persons and property over their railroad, and for the use of depots, buildings, and grounds in connection with such transportation." Pub. St. 1901, c. 160, § 1, McDuffee v. Railroad, 52 N. H. 430, 13 Am. Rep. 72. Inasmuch, therefore, as the defendants were common carriers of milk, and as it was their public duty to furnish all persons desiring to ship that commodity with reasonable facilities and accommodations for its transportation, this contention of the defendants resolves itself into the inquiry

whether their plea states facts from which it can be inferred that the furnishing of cars with icing facilities was, under the circumstances, more than they could reasonably be required to do in the fulfillment of their public duty, for the question what facilities and accommodations were a reasonable compliance with their public duty—or, to state the proposition in another way, whether the cars furnished were more than their public duty required them to do—is a question of fact. Boothby v. Railroad, 66 N. H. 342, 344, 34 Atl. 157.

The plea does not allege that it would have been reasonable, in view of the defendants' public duty, for them to have refused to furnish the Whitings with cars provided with icing facilities for the transportation of the large quantity of milk which they were daily desiring to ship, nor facts from which such an inference could reasonably be made. On the contrary, it is alleged in the plea that "at the time of the execution of all the agreements herein mentioned, large quantities of milk were produced by individual farmers living along the line of said defendants' railroad. The quantity was such that it was more economical and more advantageous to all parties—producers, distributors, and consumers—to have it transported in special cars furnished with icing facilities, than to have it carried in ordinary cars." The only reasonable deduction to be made from this allegation is that cars with icing facilities were reasonably necessary, and that those furnished did not afford greater facilities than the defendants' public duty required.

It is further contended that the defendants could not have been required to carry the shippers' servants in milk cars, and that when they agreed to carry them in these cars, they undertook to do more than their public duty required, and on this account could lawfully demand of the shippers the contract of indemnity which they did. But this contention is not supported by the facts in the case. As already stated, it was the defendants' duty to provide suitable cars in which to transport the milk. It was also their duty to provide men to handle and care for it while being transported. Beard & Sons v. Railroad, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Boscowitz v. Express Co., 93 Ill. 529, 34 Am. Rep. 191; Chesapeake, etc., R. R. v. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; and cases above cited. * * *

In this case it does not appear that the shippers were afforded the opportunity of having the defendants perform their full duty and handle and care for the milk. There is no allegation in the defendants' plea, or provision in the contract of shipment, to that effect, and, in view of the absence of such an allegation or provision, and of the defendants' contention that they were under no duty even to provide cars with icing facilities for shipping the milk, it is to be inferred the shippers were not afforded such an opportunity, and that the defendants refused to provide the cars for the milk unless the shippers would furnish the men to handle and care for it and would indemnify the defendants against all liability for damages to the men and their property. In such case it is clear that we must hold that the shippers' contract of indemnity is unreasonable and void, and that the plaintiff's contract with the shippers, which is based upon the indemnity contract, cannot be availed of by the defendants as a defense to this action. * * *

Demurrer sustained.[1]

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c. Obligation to Refrain from Discrimination.

SCOFIELD v. LAKE SHORE & M. S. RY. CO., 43 Ohio St. 571.

(1885)

The plaintiff filed a petition in the court of common pleas praying that the defendant might be restrained from discriminating against them and in favor of the Standard Oil Company as to rates charged for shipping oil, either upon its own lines or, in case of through shipments, over its line and connecting lines.

The court found that the railroad, in consideration of a promise by the Standard Oil Company to ship all their product of petroleum over its line, agreed to carry for the Standard Oil Company at an average rate about 10 cents less than the published rate charged their competitors, the plaintiffs. The difference of 10 cents a barrel on the yearly output of plaintiff's refineries would amount to about $15,000, or 21 per cent. of the capital used in their business.

[1] Obligations of public service companies to make connections. 22 Harv. L. Rev. 564-578.

ATHERTON, J. The main question in this case, and to which all others are subordinate, is this: Has the defendant a right to discriminate between its freighters and customers, and furnish transportation to one at a less rate than to others, in a case where such discrimination is injurious to and destructive of the legitimate business of others? * * *

The learned Chief Justice Beasley, in pronouncing the judgment of the Supreme Court of New Jersey, said: "In my opinion, a railroad company, constituted under statutory authority, is not only by force of its inherent nature a common carrier, * * * but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such. They must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. * * * In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is they must, in the exercise of their calling, observe to all men a perfect impartiality." Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407, 13 Am. Rep. 457.

* * * It will be observed that the gist of plaintiffs' contention is not so much that the latter are charged a rate of compensation for transportation unreasonable in itself, as that by charging a lower rate to their more favored competitor the latter is enabled to and is supplying the market at a price with which the plaintiffs cannot compete, and thus driving them out of the market and destroying the business and trade they have built up. One of the questions at issue between the parties is: What was the doctrine of the common law upon the question of the com-

pensation of a common carrier? Could the freighter require anything more than that he be charged no more than a reasonable compensation, or could he be demanded and have his goods transported at an equal rate with the favored customer?

In many cases it has been held that the customer was only entitled to have his goods shipped at a reasonable rate, and not necessarily at an equal rate with others, and that he was not interested in the matter that somebody else was charged less. Or in the incisive language of Crompton, J., to counsel in an English case: "The charging another person too little is not charging you too much."

The question, so far as it related to railroads, was settled by statute in England shortly after their introduction there; and under the "equality clause" of the English statutes railroad companies were bound to charge equally to all persons in respect to all goods under like circumstances. Pickford v. Grand Junction R. Co., 10 Mees. & W. 399; Baxendale v. London & Southwestern Railway Company, L. R. 1 Ex. 137; L. & N. W. R. Co. v. Evershed, 26 W. R. 863. * * * *

In discussing the English "equality statute" before adverted to, Beasley, C. J., pronouncing the opinion of the Supreme Court of New Jersey, says: "But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. * * * In a more recent decision, Mr. Justice Strong says that the special provisions which are sometimes inserted in railroad charters in restraint of undue preferences are 'but declaratory of what the common law now is.' This is the view which, for reasons already given, I deem correct." Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407-412, 13 Am. Rep. 457.

In some of the cases it is announced that the question of whether the law requires the common carrier to transport goods upon equal terms to all, or whether it only requires that the rate shall be reasonable, but not necessarily equal to all, has been differently determined by the courts of England and America. Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

But, be that as it may, the tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with a quasi public duty to transport merchandise on equal terms, for all parties, where the carrying for some ship-

pers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored. "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others is void as creating an illegal preference." Messenger v. Pennsylvania R. Co., supra. The Chief Justice (page 410 of 36 N. J. Law [13 Am. Rep. 457]) says: "It cannot be denied that at the common law every person under identical conditions had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus in the very foundation and substance of the business there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. * * * Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. * * * The law that forbids him to make any distinction in favor of the goods of A. over the goods of B., when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. * * * The rule that the carrier shall receive all the goods tendered loses half its value as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of the other." * * *

The case of Hays v. Pennsylvania Company (C. C.) 12 Fed. 309, decided by Baxter, J., in the Circuit Court of the United States for the Northern District of Ohio, is important in re-

spect to one element in this case. The defendant in the case at bar claims that it was proper to enter into the contract it did with the Standard Oil Company, on account of the very large amount of freightage that company annually furnishes, and that it was lawful to discriminate in their favor on that account. The plaintiffs in that case had been engaged for several years in mining and shipping coal from Salineville, and the defendant's railroad furnished them with their only means of getting their coal to market. The railroad company discriminated in favor of every shipper who shipped 5,000 tons or over, and the discrimination was from 30 to 70 cents per ton, graduated by the amount shipped.

Plaintiffs were required to and did under the discrimination pay a higher rate than their more favored competitors. They brought suit to recover for the discrimination, and under the instructions of the trial judge the jury returned a verdict for plaintiffs. The judge on a motion for a new trial said: "The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public use, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. * * * The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man engaged in mining coal, and dependent upon the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish, and does furnish, the larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest, and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success

of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult with such a ruling to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and, perhaps, tempted to favor their friends to the detriment of their personal or political opponents, or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them, or else, seeing the augmented power of capital, organize into overshadowing combinations, and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them. They have been authorized for the common benefit of everyone, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

The District Court, in their finding 10½, state that shipment by the carload was the manner in which nearly all the business was done; that, on the request of either party to furnish cars, the defendant had them switched to the refineries, and after being loaded were switched back and placed on defendant's tracks for shipment on its road. The manner of making shipments for plaintiffs, and for the Standard Oil Company, was precisely the same, and the only thing to distinguish the business of the one from the other was the aggregate yearly amounts of freight shipped. We adopt the reasoning of Baxter, J., as the better

law, and hold that a discrimination in the rate of freights resting exclusively upon such a basis ought not to be sustained. * * *

We think the authorities abundantly show that in a case like the one at bar the plaintiffs can seek relief by injunction, and that it is an appropriate method to determine the rights of the parties here without first resorting to an action at law. The plaintiffs have a manufacturing capacity of 150,000 barrels per year. Shall they be compelled to bring a separate action for each carload? What number of suits would it require? Are the damages of plaintiffs for loss of profits susceptible of easy proof, or even capable of any exact estimation? We think the plaintiffs have a clear and undoubted right to come into a court of equity and have the rights of the parties determined in a single action. * * *

The railroad is an entirety, whether within the state or without, and the artificial person, by the acts of the several states authorizing consolidation, has been created one, and not two or more; and no reason is perceived why it may not be dealt with by the courts of either state that has procured jurisdiction.

This artificial person not only holds itself out, but does make contracts for the transportation of freight over its connecting lines as well as its own line, and it makes rates to points only reached by connecting lines. No reason is perceived why it should not be ordered to make no discriminations to the injury of plaintiffs in its rates to points thus reached; but, if it makes rates to points on connecting lines, the rates should be equal to all. The order of the court is that the defendant be restrained, as prayed for in plaintiffs' petition.

Judgment accordingly.[1]

[1] "In Hoover v. Pa. R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43 (1893), a railroad carried coal for manufacturers cheaper than for retail coal dealers. The court thought the difference justifiable, and said: 'In point of fact it is perfectly well known and appreciated that the output of freights from the great manufacturing centers upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation

of an endless variety of products which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. * * * Another important incident which distinguishes them is that the establishent of manufacturing industries, and the conducting of their business, necessitates the employment of numbers of workmen and other persons whose services are needed, and these, with their families, create settlements and new centers of population, resulting in villages, towns, boroughs, and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling.'

"In State v. Central Vt. Ry. Co., 81 Vt. 463, 71 Atl. 194 (1908), where a statute required railroads to give reasonable and equal terms to all, and gave an action for damages to any person aggrieved by a violation thereof, a declaration was held bad on demurrer which alleged that defendant carried coal for a certain coal dealer at 50 cents a ton less than it charged all others, thereby compelling plaintiff, the state, to buy coal for its asylum of such dealer and at a higher price than it would have paid if able to get transportation at equal rates. The court held the statute to be declaratory of the common law, and said: "The fact that the rates charged in this case were less than those charged to others does not entitle the plaintiff to a judgment: for, as has been shown, the rates charged may have been reasonable and equal within the meaning of the law, though less in amount.'

"In Menacho v. Ward (C. C.) 27 Fed. 529 (1886), a steamship company was enjoined from advancing its rates to shippers by rival vessels.

"In Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712 (1894), a company which ran a line of steamers to islands in the Caribbean Sea offered to all who would agree to ship to Barbadoes by it exclusively to give a greatly reduced rate at any time when a certain competing steamer should be loading for that island. It was held that persons unwilling to make the agreement were not entitled to the reduced rate.

"In Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643 (1889), an agreement to give a rebate of 15 cents a ton on coal, in consideration of the shipper's undertaking, duly performed, to build a dock and coal pocket on the railroad's premises, a part of which the railroad might use in its general business, was enforced.

"In Bundred v Rice, 49 Ohio St. 640, 32 N. E. 169. 39 Am. St. Rep. 589 (1892), an agreement to give to a certain shipper of petroleum, if he would build a pipe line to the place of shipment, a lower rate than that charged to others was held invalid."—Green, Cases on Carriers, 574, Notes 581-2.

Special privileges to hackmen.—13 L. R. A. 848.

Carload rates to forwarding agents.—24 Harv. L. Rev. 669.

Discrimination in carrier's own favor by carrier acting as dealer.—19 Harv. L. Rev. 543.

d. Obligation to Make Reasonable Charges.

STEENERSON v. GREAT NORTHERN RAILWAY CO., 69 Minn. 353; 72 N. W. 713.

(1897)

The plaintiff, Elias Steenerson, in 1893 filed a complaint with the Railroad and Warehouse Commission, complaining that the tariff of charges of the Great Northern Railway Company for the transportation of wheat, oats, barley, and other grains from Crookston, Fisher, and East Grand Forks, to the terminals Minneapolis, Duluth, and St. Paul, were unjust and unreasonable, in that they were at least one-third too high, and asked that the same be reduced to and fixed at twelve cents per hundred pounds between Crookston and either of said terminals, and between other stations on said railway and said terminals in proportion, or to a just and reasonable rate. * * *

MITCHELL, J. * * * 1. It must now be accepted as the settled law that, when rates of charges by railway companies have been fixed by the legislature or a commission, the determination of the question whether such rates are "reasonable" or "unreasonable" is a judicial function. But this is so, not because the fixing of rates is a judicial function (for all the authorities agree that it is a legislative one), but solely by virtue of the constitutional guaranty that no one shall be deprived of his property without due process of law. Therefore the only function of the courts is to determine whether the rates fixed violate this constitutional principle.

Courts should be very slow to interfere with the deliberate judgment of the legislature or a legislative commission in the exercise of what is confessedly a legislative or administrative function. To warrant such interference, it should clearly appear that the rates fixed are so grossly inadequate as to be confiscatory, and hence in violation of the constitution. It is not enough to justify a court in holding a rate "unreasonable," and hence unconstitutional, that, if it was its province to fix rates, it would, in its judgment, have fixed them somewhat higher. Any such doctrine would result, in effect, in transferring the power of fixing rates from the legislature to the courts, and making it a judicial, and not a legislative, function. When

there is room for a reasonable difference of opinion, in the exercise of an honest and intelligent judgment, as to the reasonableness of a rate, the courts have no right to set up their judgment against that of the legislature or of a legislative commission. In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory. This seems to be substantially the doctrine suggested in Spring v. Schottler, 110 U. S. 347-354, 4 Sup. Ct. 48, which, so far as I can discover, is the first case in which that court suggested any modification or limitation of the doctrine of the so-called "Granger Cases." And I think it is the doctrine which the courts must finally settle down on, unless they are prepared to assume the function of themselves fixing rates.

2. What is a reasonable rate is a most difficult question, and it is doubtful whether any single rule for determining it can be laid down that would be complete, and alike applicable to all cases. But as good a general rule as I have found is that stated by counsel for the Northern Pacific Railway Company in this case, to wit:

"If a railroad is built and operated wisely and economically; if it is located where public need requires it, where there is business to justify its existence, and constructed so as to be fit and well adapted for the business which it aims to accommodate,—it should be entitled to return as good interest [on the cost of the reproduction of the road] as capital invested in the average of other lines of enterprise."

It seems to me that it follows, as corollaries from this rule, that—First, the cost of reproduction must be estimated on a present cash basis, and that it can make no difference whether a road was originally built with cash capital paid in by the stockholders, or with borrowed money secured by mortgage on the property; and, second, a rate may be reasonable during times of general financial and business depression, when capital invested in all lines of enterprise is yielding a small return, which would be unreasonable in prosperous times, when capital invested in business enterprises is yielding a much larger return. There is no constitutional principle which guarantees the capital invested in railroads immunity from business vicissitudes to which capital

invested in all other enterprises is subject. These propositions are fully discussed in the opinion. The courts should take notice of the general depression in business prevailing in 1894.

3. Where capital (including labor) invested in the production of any article or commodity is comparatively unremunerative, yielding but a small return, a rate for the transportation of such article or commodity may be reasonable, although, if the carrier was required to do all his business, at rates fixed on a corresponding basis, such rates would be unreasonable, to the extent of being confiscatory. This is but an enlarged application of a principle already suggested. It is a principle upon which railroads themselves act every day in fixing rates, recognizing as they do that rates are largely dependent upon competition among producers or shippers. Of course, this proposition has its limitations, but it is unnecessary to discuss them here. The courts, I think, should take notice of the small profit in raising grain in Minnesota in and about 1894, owing to the comparatively low prices then prevailing. * * *

Applying the rules I have suggested to the evidence, I do not think any court would be justified in holding that the railroad company has satisfactorily proved that the rates fixed by the commission for the transportation of grain are "unreasonable;" that is, if enforced, they would be confiscatory.

TIFT v. SOUTHERN RY. CO., 138 Fed. 753.

(1905)

Bill in equity by persons composing the Georgia Sawmill Association for an injunction to restrain the defendant railroad companies from inaugurating or maintaining a published advance of two cents a hundred pounds in freight rates on lumber from points in Georgia to points on the Ohio river and beyond, on the ground that the advance would violate the act to regulate commerce and cause irreparable injury to complainants. A temporary injunction was issued, but afterwards dissolved, until the question of the reasonableness of the rates could be passed upon by the Interstate Commerce Commission.

The Commission reported that the advance was unreasonable, unjust, and in violation of the act to regulate commerce, and made the following order: "That the defendants, the Southern

Railway Company, Atlantic Coast Line Railway Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railroad Company, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company, be, and each of them is hereby, notified and required to cease and desist, on or before the 1st day of April, 1905, from further maintaining or enforcing said unlawful advance of two cents per one hundred pounds, and the said unlawful rates and charges resulting therefrom, for the transportation of lumber as aforesaid."

Complainants then renewed their application for an injunction.

SPEER, District Judge. * * * It is no longer doubtful that "the question of the reasonableness of a rate of charge for transportation is eminently a question for judicial investigation." Justice Blatchford, in Chicago & St. Paul Ry. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. To this end, in part, the government has created the Interstate Commerce Commission. It is a tribunal to hear, investigate, and report on the reasonableness of rates, and to attempt the correction of inequalities and injustice therein.

Said the Supreme Court in Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 675, 20 Sup. Ct. 219, 44 L. Ed. 309: "That body, in the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon the questions of fact of the character here arising." In view of these considerations and precedents, it can, we think, be no longer open to question that the interstate commerce commission is the expert tribunal empowered by law to determine, in the first instance, the reasonable or unreasonable character of the rates charged for transportation in interstate commerce. * * *

It is proper to observe, however, that the court has considered the entire record, and has formed its conclusions not only from the report of the Commission, but from all the evidence submitted to that body and stipulated into the case here, and from the additional evidence submitted de novo on this hearing.

A highly significant feature of this case is the fact that the rates complained of are the result of concert of action on the part of the members of the Southeastern Freight Association.

* * * In reply to the contention on the part of the respondents that they acted independently each for itself, and not through the agency of the Southeastern Freight Association, the Commission finds: "The proof shows conclusively that the advance was the outcome of concert of action and previous understanding between the companies. Through their authorized official representatives, they conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none; and, finally, they all promulgated the advance to take effect at exactly the same date and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to rates from Georgia shipping points, but was participated in by the lumber-hauling roads serving the territories both west and east of the Mississippi in Arkansas, Louisiana, Mississippi, Alabama, and Florida."

The Commission concludes that it is its duty to consider this joint, or concert of, action of the defendants as bearing upon the reasonableness and validity of the advanced rate which results. It holds that the element of competition is eliminated. In the absence of legitimate competition, destroyed, as we shall presently see, by methods obviously illegal, the Commission presumes that the advance rates are higher than legitimate competition would produce. In other words, the marked increase of charges for transportation of that commodity which, save one other, affords the largest tonnage of freight to the respondent roads, did not originate from a normal or reasonable exigency of the respondents' business. On the contrary, it was an arbitrary exaction, imposed by a combination of railroad agents made in restraint of the natural movement of the product in the lumber trade. This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them after-

wards. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States and many rulings of the Circuit Courts and of the state courts.

Perhaps the leading cases on this subject are United States v. Freight Association, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; Joint Traffic Association Case, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. In the first case the court had under consideration the legality of the Trans-Missouri Freight Association. The agreement of that body may differ in form, but its substantial purpose was the same as that of the Southeastern Freight Association. It avowedly was the "mutual protection to the railroads by establishing and maintaining reasonable rates rules, and regulations on all freight traffic, both through and local." After argument by many of the most eminent counsel in the country, and after exhaustive consideration, the court held that the anti-trust law prohibiting contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries applies to and covers common carriers by railroad, and a contract between them in restraint of such trade or commerce is prohibited even though the contract is entered into between competing railroads only for the purpose of thereby affecting traffic rates for the transportation of persons and property. It was further held that, in order to maintain such a contention the complainant is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is the necessary effect, and concluded that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce. The court then proceeds to declare that the agreement of the association does in fact constitute such a restraint in violation of the law. It is proper to state that four judges three of whom are not now on the bench of the court, dissented from this conclusion; but the opinion of the majority is, of course, controlling. In the subsequent case of United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the court, after full consideration, reaffirmed its holding in the Trans-Missouri Case. * * *

The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by arbitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations. It was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice President Culp of the Southern Railway Company. To quote his language: They "looked about to see where" they could best, but without injury, get that additional revenue, and one of the commodities which they thought would "bear an advance" was lumber. But the courts have more than once decisively corrected this assumption on the part of railway officials. It is true that the business of railway transportation is usually carried on by private capital invested in corporations. It is, however, business of a quasi public nature. As we have seen, there is no doubt that within the limitations of the Constitution it is subject to governmental control. These facts prohibit the agents of the railway from charging, like the owners of other property, any price they may choose to exact for the use of the railroad. * * *

After careful consideration of the extensive record, there seems to have been an utter absence of excuse or justification for the concerted action of the railroads which advanced the rates on lumber throughout the South. The vast increase of the lumber traffic had resulted in large increase of net revenue for those roads. The service was inexpensive. It required neither rapidity of movement nor specially equipped cars, and such simple equipment as was needed the shippers were obliged to furnish and pay for. The railroads were required neither to load nor unload the cars. This was done by the consignor and consignee. The lumber carried was neither fragile nor perishable, and the risk therefore from loss or damage was inappreciable. Mr. Tift, the principal witness for the complainants, and one of the largest lumber men of the state, testified that for 30 years he had not been compelled to present a claim for damage on lumber shipped from his mill. Nor were there any exigencies in the financial condition of the principal defendants which called for so vast a contribution to their treasuries from

an industry whose product forms such a large part of their tonnages, and which is so indispensable to the public welfare. * * *

They have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of laws, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the people. * * *

In this case the conclusions of the court as to the issues involved agree with the conclusions of the interstate commerce commission as expressed by their report. A decree enjoining all the respondents against further enforcement of the rates complained of will be at once entered. * * *

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e. Diligence: Insurance.

FORWARD v. PITTARD, 1 T. R. 27.

(1785)

This was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. This action was tried at the last summer assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case:

"The defendant was a common carrier from London to Shaftsbury. That on Thursday the 14th of October, 1784, the plaintiff delivered to him on Weyhill twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftsbury by his public road wagon, which travels from London through Andover to Shaftsbury. That, by the course of traveling, such wagon was not to leave Andover till the Saturday even-

ing following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of one hundred yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning."

N. Bond, for the plaintiff. The question is, whether a carrier is liable for the loss of goods occasioned by fire, without any negligence in him or his servants. The general proposition is, that the carrier is liable in all cases, except the loss be occasioned by the act of God or the king's enemies. Lord Raymond, 909; 1 Wils. 281. And this doctrine has lately been recognized by this Court, in the case of the Company of the Trent Navigation v. Wood. East 25 Geo. 3 B. R. The only doubt is on the construction of the words "the act of God." It is an effect immediately produced without the interposition of any human cause. In Amies and Stephens, 1 Stra. 128, these words were held to include the case of a ship being lost by tempest. In the books, under the head of "waste," there is an analogous distinction to be found: if a house fall down by tempest, or be burned by lightning, it is no waste; but burning by negligence or mischance is waste. Co. Lit. 53, a, b.

Before the 6th of Anne, 6 Ann. c. 31; 10 Ann. c. 14, an action lay against any person in whose house a fire accidentally began: this shows that an accidental fire was not in law considered as the act of God; but the person was punishable for negligence. Suppose a fire happens in a house where there are different lodgers, each of whose lodgings is considered as a separate house: if the fire be communicated from one lodging to another, and the Court say the first fire was the act of man, at what time will it be said that it ceases to be the act of man and commences to be the act of God? If it were not the act of man in the first house, it is impossible to draw the line. In the case of the Company of the Trent Navigation and Wood, Lord Mansfield said, "By the act of God is meant a natural, not merely an inevitable, accident."

If it be contended for the defendant that it is here stated that there was no actual negligence, that will not serve him; for this action was not founded in negligence. Lord Holt says, there are several species of bailments, and different degrees of liability annexed to each; and a carrier is that kind of bailee who is answerable though there be no actual negligence.

Borough, for the defendant, observed that the point in this case was not before the Court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to carriers. And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight can prevent; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. Rich v. Kneeland, Cro. Jac. 330; Hob. 17, 5 Burr. 2827.

All the authorities cited by the counsel for the plaintiff are founded on the dictum in Coggs v. Bernard, 2 Lord Raymond, 909, where this doctrine was first laid down; but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say, that cases falling within the reasoning of what are vulgarly called "acts of God" should not also be good defenses for a carrier. After saying (Lord Raymond, 918), "the law charges the persons, thus intrusted to carry goods, against all events but the acts of God and of the enemies of the king," he proceeds thus, "for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons who

had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." As Lord Holt therefore states the responsibility of carriers in case of robbery to take its origin from a ground of policy, he could not mean to say that a carrier was also liable in cases of accidents, where neither combination nor negligence can possibly exist.

It appears from the Doctor and Student (Dial. 2, c. 38, p. 270) that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. And what there is said agrees precisely with the custom, and does not bear hard on the carrier. If he will travel by night, and is robbed, he has no remedy against the hundred; for then he is not protected by the statute of Winton, and he ought to be answerable to the employer. If he travel by day and is robbed, he has a remedy. Now the carrier may not perhaps be worth suing; and the employer may bring the action against the hundred in his own name; which action he would be deprived of, if the carrier traveled by night.

There is not a single authority in all the old books which says that a carrier is responsible for mere accidents. He only engages against subtraction, spoil, and loss, occasioned by the neglect of himself or his servants. These words plainly point at acts to be done, and omissions of care and diligence. But in the present case there is no act done; and there cannot be said to be any omission of care and diligence, since they could not have prevented the calamity.

Lord Holt, in Coggs v. Bernard, seems to have traced, with great attention, the different species of bailments. He cites many passages from Bracton, who has nearly copied them from Justinian. So that it is probable that the custom relating to carriers took its origin from the civil law as to bailments. Now it is observable that in no one case of bailment is the bailee answerable for an accident; he is only liable for want of diligence. The only difference in this respect between the civil and the English law is, that the former (Justin. lib. 3, 15, s. 2, 3, 4, tit. 35, s. 5) distinguishes between the different degrees of diligence required in the different species of bailmnt; which the latter does not.

In all the cases to be found in our books may be traced the true ground of liability, negligence. If the law were not as is now contended for, the question of negligence could never have arisen; and the case of robbery could not have borne any argument; whereas the case of Morse v. Slue, 1 Vent. 190, 238, [114] came on repeatedly before the Court, and created very considerable doubts.

In the case of Dale v. Hall, 1 Wils. 281, and the Proprietors of the Trent Navigation v. Wood, 3 Esp. 127 [95], there were clear facts of negligence. In the first, the rats gnawed a hole in the hoy, which undoubtedly might have been prevented. And in the other, each of the judges, in giving his opinion, said there was negligence.

In the Year Books, 22 Ass. 41, there is a case of an action against a waterman for overloading his boat so that the plaintiff's horse was drowned. This case is recognized in Williams v. Lloyd, S. W. Jones, 180, where it is said, "it was there agreed that if he had not surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit; but if he surcharged the boat, otherwise; for there is default and negligence in the party." The Court in 22 Ass. 41, said, "it seems that you trespassed when you surcharged the boat by which the horse perished." The same case is to be found in 1 Ro. Abr. 10, pl. 18, Bro. Tit. Action sur le Case 78. And it is also recognized in Williams v. Hide and Ux. Palm. 548.

However, if the Court should be of the opinion that the carrier is answerable for every loss, unless occasioned by the act of God or the king's enemies, he then contended that, as the act of God was a good ground of defense, this accident, though not within the words, was within the reason, of that ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, etc., are the immediate acts of the Almighty; they are permitted, but not directed by him. The reason why these accidents are not held to charge a carrier is, that they are not under the control of the contracting party, and therefore cannot affect the contract, inasmuch as he engages only against those events which by possibility he may prevent. * * *

It is expressly found, in the present case, that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course

it would take was as little to be discovered by human penetration.

Bond, in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence; for everything is negligence which the law does not excuse, 1 Wils. 282. And the question here is, is this a case which the law does excuse? In Goffe v. Clinkard, cited in Wils. 282, there was all possible care on the part of the defendants. The judgment in the case of Gibbon v. Peyton and another, 4 Burr. 2298, which was an action against a stagecoachman for not delivering money sent, is extremely strong; there Lord Mansfield said, 4 Burr. 2030, "a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery."

That a carrier was liable in the case of a robbery was first held in 9 Ed. 4, pl. 40.

A bailee only engages to take care of his goods as his own, and is not answerable for a robbery; but a carrier insures. 1 Ventr. 190. 238; Sir T. Raym. 220; s. c., 1 Mod. 85.

In Barclay and Heygena, E. 24, G. 3, B. R., which was an action against a master of a ship to recover the value of some goods put on board his ship in order to be carried to St. Sebastian; it was proved that an irresistible force broke into the ship in the river Thames, and stole the goods; yet the defendant was held answerable. In Sutton and Mitchel, at the sittings at Guildhall after Tr. 25, G. 3, the question was not disputed as far as to the value of the ship and freight.

There is no distinction between that case and a land carrier. And there can be no hardship in the Court's determining in favor of the plaintiff; for when the law is once known and established, the parties may contract according to the terms which it prescribes.

As to negligence being a matter of fact, that is answered by the decision in the Company of the Trent Navigation against Wood.

Lord Mansfield. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action. Cur. adv. vult.

Afterward Lord Mansfield delivered the unanimous opinion of the Court.

After stating the case—The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm,—that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the king's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.[1]

[1] Proprietors of the Trent Nav. Co. v. Wood, 3 Esp. 127 (1785). This was an action of assumpsit.

The declaration stated that the plaintiffs, as proprietors of the Trent Navigation, undertook to carry the defendant's goods from Hull to Gainsborough; that in the river Humber, the vessel on board which the defendant's goods were, sunk, by driving against an anchor in the river; and the goods were, in consequence of the accident, considerably damaged. That the plaintiffs repaired the damage the goods had sustained, and sent them home to the defendant; and the breach was, that the defendant refused to pay the money the plain-

COLT ET AL. v. M'MECHEN, 6 John. (N. Y.) 160.

(1810)

This was an action on the case, against the defendant, as a common carrier of goods for hire, in a certain sloop, called the Margaret, between Kinderhook and New York, on the Hudson river. The declaration stated that the plaintiffs were possessed of certain goods, &c., which the defendant, by his servant Matthew M'Kean, master of the said sloop, received on board to carry, transport and convey from New York to Kinderhook landing, for a reasonable price or compensation, &c., but that the goods were never delivered, &c. Plea, not guilty.

The damage which the goods of the plaintiff received, was from 10 to 20 per cent. besides some which were wholly lost, amounting to 1,316 dollars.

SPENCER, J. The plaintiffs have moved for a new trial on two grounds: 1st. For a misdirection to the jury, in stating that the failure of the wind was the act of God; and, 2d. For that the verdict was against evidence, on the point submitted to the jury, in relation to the negligence or carelessness of the master of the sloop, after she struck.

There can be no contrariety of opinion, on the law which renders common carriers liable. However rigid the rule may be, they are responsible for every injury done to goods entrusted to them to carry, unless it proceeds from the act of God, or the enemies of the land. What shall be considered the act of God as contradistinguished from an act resulting from human means, affords the only difficulty in the case.

tiffs had expended in the recovery of the goods. There was also a count in the declaration for money had and received, which was for freight. At the trial the plaintiffs were nonsuited.

A rule having been obtained, to show cause why the nonsuit should not be set aside, it came on to be argued on this.

LORD MANSFIELD. This is certainly a sea voyage. It is a general question, and no case has been cited exactly in point; but it is clear that the carrier is liable in all cases, except for accidents happening by the act of God or by the king's enemies. The act of God is a natural necessity, and inevitably such, as winds, storms, etc. The case of a robbery is certainly very strong, but not a natural necessity; and in this case there is an injury by a private man, within the reason of the instance of robbery; yet I think the carriers ought to be liable. There is some sort of negligence here; for as the buoy could not be seen, there should have been, on that account, a greater degree of caution used.

11 Harv. L. Rev. 158; Nugent v. Smith; 1 T. R. 33 (1876).

The cause was summed up to the jury on this point, "that if they were satisfied from the whole evidence, that the vessel ran ashore in consequence of the sudden failure of the wind, the law would consider it as the act of God, and exculpate the defendant." By finding a verdict for the defendant, the jury have believed the testimony of Captain M'Kean, and the other witnesses produced by the defendant, in their account of the manner and circumstances under which the vessel grounded. The substance of that testimony is, that the vessel being on her passage from New York to Kinderhook, late in the month of November, 1800, proceeded on the passage to West Camp, where the vessel came to, from thence they weighed anchor and beat against the wind; from the lateness of the season, and for fear of ice, the captain was anxious to make Livingston's dock, which was considered a place of safety, and at which they had nearly arrived, when the accident happened; that the wind was light and variable, but sufficient to enable them to make considerable progress, and would have been sufficient, if it had continued, to have enabled them to have reached the dock, in a few more tacks; they were standing for the west shore, and had approached it, as near as was usual and proper, when they put down the helm to bring her about, the jibsail begun to fill, the vessel partly changed her tack, when the wind suddenly ceased blowing, and the headway under which the vessel was, shot her on the bank. Captain M'Kean states, that he was well acquainted with the shore, and had before approached as near as he did then, when beating to windward; and that, when standing for the west shore, he had wind enough to enable him to manage the vessel with safety; that as the water fell, the stern of the sloop settled, and did not rise until flood tide, in consequence of which, the water rushed in at the windows, and thereby the plaintiff's goods were wet and damaged. He states, distinctly, that the sudden and entire failure of the wind was the sole cause of the vessel's grounding.

The case of Amies v. Stevens (1 Str. 128) shows that sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier and overset, by the violence of the shock, has been adjudged to be the act of God, or vis divina. The sudden gust, in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the

vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case; and in the other, the wind was stayed by Him.

It has been said, that the captain was guilty of negligence in attempting to beat, and in approaching the shore as near as he did when the disaster happened, the wind being, as he states, light and variable. It may be observed, that the master had his choice of alternatives, either to improve the wind he then had, in order to reach a place of safety, or to be exposed, in the middle of the river, to the effects of ice. The season of the year, and the interests of all concerned, justified the captain in attempting to reach Livingston's dock. It was not, as I recollect, pretended, on the trial, that his conduct was improper and unusual in approaching the shore as near as he did on the tack in which the vessel grounded; at all events, the case does not show that the judge expressed any opinion on that point; and the plaintiff must have had the full benefit of that objection to the captain's conduct. I should undoubtedly have been of opinion, as the captain was situated, taking into view the lateness of the season, the narrowness of the channel, and the fact, that he was not nearer the shore than is usual and customary in beating, that he was not guilty of negligence or improper conduct in that respect.

No rule of law having been violated, in the charge to the jury, if there even were grounds for saying that there is some degree of negligence imputable to the master, that point has been under the consideration of the jury, or it was not insisted on before them, and, in either case, when the plaintiffs attempt to fix the defendant with a loss from a very rigid rule of law, I should not disturb the verdict of a jury, to give them another opportunity to urge that objection. In the case of the Proprietors of the Trent Navigation v. Wood, the vessel was sunk, by driving against an anchor, in the river Humber, and the goods were considerably damaged by the accident; it was not pretended by the counsel, that this was the act of God, and Lord Mansfield considered it the injury of a private man, within the reason of the instance of robbery. Abbott, in his notice of this case (Abbott, 256) observes that both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it;

as when he saw the vessel in the river, he must have known that there was an anchor near at hand; or if it was to be taken, that negligence was imputable only to the master who had left his anchor without a buoy, that he was answerable over to the masters and owners of the vessel, whose cargo had been injured. Again, he observes (p. 227) that if a ship is forced on a rock or shallow, by adverse winds or tempests, or if the shallow was occasioned by a recent collection of sand, where ships could sail with safety, the loss is to be attributed to the act of God, or the perils of the sea. Upon a position so plain, in my apprehension, as that the sudden cessation of a wind which was competent, at the very moment when the vessel began to come about, for the avoidance of the shoal, was the act of God, and did not arise from the fault or negligence of man, I am at a loss for further illustration.

The second point, on which a new trial is sought, was fairly and fully before the jury; and without entering upon it further, I cannot but express my perfect concurrence in opinion with them; the master did everything which could reasonably be expected of him, to prevent the vessel from sinking. Accordingly, my opinion is against a new trial.

THOMPSON, J., VAN NESS, J., and YATES, J., concurred.

KENT, C. J. I concur in the general doctrine, that the sudden failure of the wind was an act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence. But I think there was a degree of negligence, imputable to the master, in sailing so near the shore under a "light, variable wind," that a failure in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity. (Trent Navigation v. Wood, 3 Esp. N. P. 127.) A casus fortuitus was defined, in the civil law, to be quod facto contingit, cuivis diligentissimo possit contingere. But as this point does not appear to have been particularly urged at the trial, and the verdict negatives the charge of negligence; and as the responsibility of common carriers may be deemed sufficiently strict, I am content not to inter-

fere with the verdict, though I think that the evidence would have warranted the conclusion of negligence to a certain extent.

Judgment for the defendant.

STILES v. DAVIS & BARTON, 1 Black (U. S. Cir.) 101.

(1861)

Writ of error to the District Court of the United States for the northern district of Illinois.

The jury found for the plaintiff $3,041.14. The Court gave judgment on the verdict, and the defendant sued out this writ of error.

NELSON, J. The case was this: The plaintiffs below, Davis & Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury, that any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnisheed, as the property of third persons, of itself, under the circumstances

of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons: but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attach't, 2d edition.

This precise question was determined in Verrall v. Robinson, (Turwhitt's Exch. R., 1069; 4 Dowling, 242, S. C.) There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord Abinger, C. B., observed, that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no evidence of a wrongful conversion to his own use. After it was attached as Bank's property, it was not in the custody of the defendant, in such a manner as to permit him to deliver it up at all. And Alderson, B., observed: Had the defendant de-

livered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no jurisdiction, if the plaintiff could have maintained a title and right to possession in themselves.

Judgment of the court below reversed, and venire de novo, &c.

RAILROAD CO. v. REEVES, 10 Wall. (U. S.) 176.

(1869)

In error to the Circuit Court for the Western District of Tennessee, the case being this:

Reeves sued the Memphis and Charleston Railroad Company as a common carrier for damage to a quantity of tobacco received by it for carriage, the allegation being negligence and want of due care. The tobacco came by rail from Salisbury, North Carolina, to Chattanooga, Tennessee, reaching the latter place on the 5th of March, 1867. At Chattanooga it was received by the Memphis and Charleston Railroad Company on the 5th of March, and reloaded into two of its cars, about five o'clock in the afternoon.

One Price, who as agent of Reeves was attending and looking after the tobacco along the route, testified (though his testimony on this point was contradicted) that the agent of the company at Chattanooga promised that, if the bills were brought over in time, the tobacco go forward at six o'clock that evening; and shortly before that time informed him that the bills had come over, and assured him that the tobacco would go off at that hour. It did not do so, though he, Price, the agent, supposing that it would, went on by a passenger train and so could no longer look after the tobacco. By the time-tables which governed at the time the forwarding of freight, goods received during one day were forwarded the next morning at 5.45 a. m., and at that time the train on which the tobacco in question was placed went off. The train, however, found the road ob-

structed by rocks that had fallen during the night and had to return, and in consequence of information of the washing away of a bridge on the road, had to remain at Chattanooga. Chattanooga is built on low ground, on the Tennessee River, which a short distance west of it, runs along the base of Lookout Mountain. On the 5th of March there had been heavy rains for some weeks, and the river had been rising and was very high. Freshets of the years 1826 and 1847, the highest ever remembered previous to one now to be spoken of, or of which there was any tradition, had not risen by within three feet as high as the level of the railroad track in the station where the cars containing the tobacco were placed, on their coming back to Chattanooga, after their unsuccessful attempt to go forward.

The river rose gradually until the evening of the 7th (Thursday), at which time it reached the high water mark of 1847. That night it rose an average of four inches an hour from 7 p. m. to 6.30 a. m. of the 8th of March, and it continued to rise until about 2 p. m. of Sunday, the 10th of March. On Friday, at 1 p. m., the engines standing on the tracks were submerged so that their lower fire-boxes were covered. On Saturday, at 8 p. m., the engines and cars were submerged ten feet or more, and the freight in question was thus damaged. Had it gone off on the evening of the 5th it would not have been damaged. A freight train did leave Chattanooga going towards Memphis on that evening, but it carried freight of the Nashville and Chattanooga road only, and none for the road of the defendant. Four or five days elapsed from the time when the water began to come up into the town, before it was so high as to submerge the cars and injure the freight. No one expected the water would rise as it did, because it rose full fifteen feet higher than had ever before been known. The rise was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came suddenly from the direction of the Western and Atlantic road, opposite to its former direction, and then rose very rapidly. Although on the 6th the river was getting out of its banks, there was no apprehension, up to the night of the 7th, that the water would submerge the town. During the night of the 7th merchants removed their goods, and one Phillips, who that night removed his to the second story of a building standing on ground no higher than the depot, saved them.

The water rose into his building on the morning of the 8th. The people finally fled to the hills, and there was a universal destruction of property as well of individuals as of railroads passing through the city. The waters indeed were so high and the flood finally so unexpected that the mayor broke open railroad cars and took provisions which were in process of transportation, to feed the famishing population. The cars in which the tobacco was were standing on the highest ground in the region of the station. There were roads in other directions, besides the road over which the rock had fallen, physically traversable by the cars which had the tobacco; but there were difficulties of various kinds in going on them, which the agents considered amounted to a bar to trying to use them.

The trial and verdict went for the plaintiff. A motion was made by the defendant for a new trial, and overruled.

MILLER, J., delivered the opinion of the court. * * *

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words:

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he had excused himself by showing

the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent, and extraordinary floods ever known in that part of the country. Tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a landslide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In Morrison v. Davis & Co., goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, causa proxima, non remota spectatur, applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads

of families usually exhibit in matters that are interesting to them.

In Denny v. New York Central Railroad Co., the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of Morrison v. Davis & Co.

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract the failure to comply would have been only the remote cause of the loss.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

Judgment reversed and a new trial ordered.[1]

SOUTHERN EXP. CO. v. WOMACK, 1 Heisk. (Tenn.), 256.

(1870)

R. McFARLAND, S. J., delivered the opinion of the Court.

This is an action brought by defendant in error against the plaintiff in error as a common carrier, for failing to carry and deliver a quantity of household goods, notes, bonds, checks, &c., according to contract, from Prospect Depot, in Virginia, to Bristol, Tennessee; and in another count, for failing to deliver said goods at Lynchburg, Virginia.

[1] Cf. Bibb. etc., Co. v. Atchison, etc., Co., 94 Minn. 264.

The plaintiff recovered in the Court below, and a new trial being refused the defendant, an appeal in error has been presented to this Court.

A number of pleas were filed. Upon some of these there was issue, and to others a demurrer was sustained. We do not deem it necessary to consider the questions raised by these pleadings, for, in our opinion, all the defenses therein indicated, so far as they are good in law, might have been made under the first plea, which is non assumpsit. We will, therefore, proceed to inquire whether the plaintiff in error had the full benefit of all the defenses to which he was entitled under the general issue.

The proof tends to show the following state of facts: The plaintiff in error was a common carrier, in the full, legal sense of the term, from Richmond, in Virginia, to Bristol, Tennessee, by way of Lynchburg. Their mode of transportation was by railway. Prospect Depot was a way station between Richmond and Lynchburg. About the middle of March, 1865, the boxes containing the goods in question, were delivered to R. V. Davis, the agent of the Company at Prospect Depot, for transportation to Bristol, the boxes being properly marked. Davis gave Mrs. Womack, the wife of the defendant in error, a receipt simply acknowledging the receipt of the goods for transportation, and received from her the amount of charges for transporting the goods to Lynchburg, in Confederate money, he not being authorized to collect the charges any farther.

The proof further shows that the railway trains upon which the plaintiffs in error carried freights, continued to pass daily in the direction of Lynchburg, with, perhaps, some occasional interruption, until near the 7th of April. That, for the first four days after the goods were received, Davis carried them to the track of the railroad, as the train passed, and tendered them to the "Messenger" as he is called, who was the agent of the company, and whose duty it was to receive the goods upon the train, and forward them. That the messenger declined to take the goods on, alleging that he had no room for them, but would try to take them next day. After this, Davis continued each day for some weeks to apply to the messenger to take the goods, but was "put off" from day to day, with substantially the same reply. That towards the 7th of April, one Thomas Agee,

who had hauled the goods to the depot, and who was the friend of the defendant in error, finding that the goods were still in the depot, and that hostile armies were approaching, proposed to Davis to take charge of the goods, and haul them away, and take care of them, but this proposal was refused by Davis. On the 7th of April, the depot was captured by the United States forces, and the goods captured or destroyed, except a small quantity that were afterwards recovered by the defendant in error.

The proof for the plaintiff in error shows that, at the time the goods were received, Prospect Depot was inside the military lines of the Confederate forces, and so remained until the 7th of April. That the line of railroad referred to was not owned by them, but that they hired from the railroad company a car which they used on each trip for the transportation of their freight. The proof further shows that between the 16th of March and the 7th of April, large quantities of freight were sent from Richmond and other points in the direction of Lynchburg; that the Confederate military forces had the preference upon the road, and on some occasions the "Express car" was taken from the plaintiff in error, for the use of the military, and the proof renders it probable that the express cars, during that period, were loaded to their capacity, when going in the direction of Lynchburg, before they reached Prospect Depot.

It was further proven by the plaintiff in error, that they generally used a printed form of receipt which they gave when goods were delivered to them, but at the time of this transaction, the agent, Davis, had none of these blanks on hand.

It was also proved by them, that when Mrs. Womack was asked what the boxes contained, she replied that they contained "beds, bed clothing, wearing apparel," etc., but did not disclose that they contained bonds, notes, or anything of that character, the question being pressed upon her no further.

Upon this, various questions are made and argued as to the action of the Court below.

1. His Honor, the Circuit Judge, was asked to instruct the jury, that if the charges for the transportation of the goods were paid in Confederate Treasury notes, this being the consideration of their undertaking, the contract would be void, and no recovery could be had. * * * The consideration of the

undertaking upon the part of the plaintiff in error, was, that the goods should be then and there delivered to them, to be carried for hire, to be then or afterwards paid to them. * * * It has furthermore been held at the present term, that a contract founded upon a consideration of "Confederate money" is not necessarily illegal.

2. The Court was asked to instruct the jury, that if a receipt was executed by the agent of the company, upon the delivery of the goods, this receipt would be the highest evidence of the contract, and no parol evidence could be heard to establish the contract. * * *

Again, according to the evidence, this receipt did not purport to contain any contract, but was simply an acknowledgment of the receipt of the goods for transportation. In such a case, on the receipt of the goods, for transportation, without any express stipulations as to the measure of liability, the law supplies the contract and fixes the rights and liabilities of the parties, and the mere delivery of the property, which is the only fact intended to be established by these receipts, may as well be proven by parol evidence as otherwise.

3. The defendant offered in evidence a receipt which seems to have been a printed form, such as the Express Company were in the habit of using. This receipt contains many limitations upon the company's common-law liability as carriers, and in fact provides that they shall only be liable in case of gross negligence, or fraud of their agents, and throws the burden of proving this upon the other party; and upon this, the Court was asked to instruct the jury, that, if Davis was only authorized by the company to execute receipts in this form, then he was only a special agent of the company, and they would not be bound by any receipt he might give in a different form. * * *

The question whether common carriers may limit their liability by notice of this character, or even by an express contract, has been much discussed, and upon it, there is a conflict of judicial opinion. The question is one of great practical importance, owing to the vastly increased number of business transactions of this character, but it need not be definitely settled in this case. * * *

We are of opinion that the plaintiff below having waived his claim to any recovery for the notes, bonds, bills, etc., con-

tained in the boxes, and the court having told the jury that the concealment by the plaintiff's wife of the fact that the boxes contained these articles, if not made with a fraudulent purpose, would not defeat the plaintiff's right to recover for the balance of the property, there was no error in this part of the case.

We further hold that the fact that the plaintiff in error did not have the necessary cars or means of transportation to carry the goods after they were received, is no defense unless it was expressly stipulated at the time that such was to be the extent of their obligation. If they received the goods without any express contract, the law fixes their liability, and they were bound to furnish the transportation and carry the goods, and could only be excused by the act of God or the public enemy. This is well settled principle of law. Johnson v. Friar, 4 Yer. 48; Turney v. Wilson, 7 Yer. 340; Walker v. Skipwith, Meigs, 502; East Tennessee and Georgia Railroad Co. v. Nelson, 1 Cold. 272.

Many authorities go further, and hold that this liability cannot be limited by notice or express contract. Hollister v. Newland, 19 Wend. 234; Cole v. Godwin, 19 Wend. 251; Gould v. Hill, 2 Hill (N. Y.) 623.

In view of the fact of the constantly increasing business of this character, and the great power exercised by common carriers over the lives and property of the citizen, we are not disposed to weaken, in any degree, the force of this rule.

4. Are the United States troops, who, it is alleged, destroyed these goods, to be regarded as "the public enemies," or "the enemies of the country," in the sense of the law, so as to excuse the plaintiff in error for the loss of the goods caused by these acts, without fault on the part of the agents of the company? His Honor, the Circuit Judge, decided this proposition in the negative, and said: "The United States army or troops were not enemies to the Government, or public enemies; they were public friends and friends to the Government; there was but one Government in the United States and that was the United States Government." Consequently the United States troops, under General Stoneman, a United States General, and commanding for the United States, were not the enemies of the United States Government." His Honor further told the jury "that the Confederate States never were recognized by any Government as

a Government de jure or de facto. Our Supreme Court recognized them as belligerents so as to regulate criminal intent in robbery and some other felonies, but no further. The army of the so-called Confederate States was an unlawful combination, nothing but a mob, however huge its proportions may have been; consequently if the goods were destroyed by the United States troops that would not exonerate the company."

We are of opinion that the definition, as above given by his Honor, of the character of the late war, and as to the status of the Confederate Government, is not correct or accurate; but the only question of practical importance is, was he correct in holding that the United States troops were not to be regarded as the public enemy, against whose acts the plaintiff in error did not insure. If he was in error in this, it was an error affecting the merits, and a new trial should be granted. If, on the other hand, he answered this question correctly, then the error which followed in giving a definition of the character of the rebellion—a definition which was unnecessary—was immaterial, and could not have prejudiced the plaintiff in error. The term "public enemy," for the "enemy of the country, has, in general, a technical legal meaning. It is understood to apply to foreign nations, with whom there is open war, and to pirates, who are considered at war with all mankind; but it does not include robbers, thieves, or rioters or insurgents, whatever be their violence." Story on Contr., 572.

In England, the term "public enemies," or "the King's enemies," as applied to the law of treason, has been held not to apply to insurgents or rebels, they not being enemies. Hawkins' Pleas of the Crown, 55.

It has been held by the Supreme Court of the United States, in a number of cases known as the Prize Cases, that the late rebellion was "a war" in the legal sense, as contradistinguished from a mere insurrection, and that as a consequence of this in the conduct of the war during its pendency, the persons living upon either side of the line dividing the contending forces were to be regarded as enemies of the other, to the extent to authorize the forfeiture of the property of either captured by the other upon the high seas.

In the case of Thorington v. Smith, 9 Wallace, 1, Chief Justice Chase classes the Confederate Government among that class

of cases where a foreign government, at war with our own, for instance, obtains temporary possession of a portion of our country, and establishes their authority over it, and enforces the same by military power; and says: "Belligerent rights were conceded to it, and thereafter its territory, held to be enemy's territory, and for most purposes, its inhabitants held to be enemies."

It is clear that, during the war, the parties upon each side treated each other as enemies, and this was justified by the laws and usages of war.

As an abstract proposition, it cannot be doubted that the United States Government was the rightful government, and that the war was rightfully prosecuted for the enforcement of its laws; and the attempted revolution being successful, no portion of the citizens were at any time released from their allegiance to the rightful government, however they may be excused or justified in rendering obedience to the usurped government, in civil matters, so long as this obedience might have been enforced by actual military power; and we are not to be understood as announcing the proposition that, in reality, the United States Government or troops were the public enemy of its own citizens during the progress of the war.

But in construing this contract, and determining the rights and liabilities of the parties themselves, we must give to the term "public enemy," or "enemy of the country," the meaning that attached to it at the time and place the contract was made. We have seen that at the date of this transaction both parties resided within the military lines of the "Confederate States." We have also seen that at that time, "for most purposes," the people upon each side of the dividing line were treated as the enemies of the other. So that the term "public enemy," or "enemy of the country," as understood and applied by the contract parties at the time, included the troops of the United States Government, and that the plaintiffs in error are not, under the circumstances, to be held as insurers against loss that might occur by the act of the United States troops.

Such was not the legal import of the contract they made, or its meaning as they then understood it.

It follows, therefore, that while in one sense the proposition of his Honor was correct, it was not the proper instruction ap-

ts of the case. For this error alone we re-
nd remand the cause for a new trial.
the record, upon which the plaintiffs in
.e been held liable for their failure to carry
n them before the time they are alleged to have
d by the United States troops; but as this was a
fact, they were entitled to have the case submitted to
.y upon a correct charge.
Reverse the judgment.

EVANS v. FITCHBURG R. R. CO., 111 Mass. 142.

(1872)

Tort against common carriers to recover for injuries to the plaintiff's horse. At the trial in the Superior Court, before Rockwell, J., the plaintiff offered evidence that he delivered to the defendants to be carried on their road two horses, which were kept and used as a span; that he saw them placed and fastened by their halters at the end of a car in separate corners; that when the horses arrived they were in the same position, but one was seriously injured on his hind legs, and his halter rope was hitched so tightly around his lower jaw as evidently to have caused him pain; that the injuries were caused by kicks from the other horse; and that the horses had been previously kind and well behaved.

The defendants introduced evidence tending to show that the car was suitable for transporting horses; that it was usual to fasten horses in the corners as was done with these; that the plaintiff fastened the horses, and the defendants did not change the fastening and knew of nothing peculiar about it.

It appeared that the horses were shod, and the defendants offered testimony that although it was customary to transport horses in that condition, the owners for greater safety sometimes had the shoes removed.

The defendants requested the judge to instruct the jury "that if the defendants used due care, and provided a suitable car, and the injuries were caused by the peculiar character and propensities of the animals, such as fright or bad temper, the defendants were not liable; and that if the injuries were caused by the fault or neglect of the plaintiff, or his agents, in attaching

the halter rope to the horse's jaw, or in not removing the shoes, the defendants were not liable."

The judge declined so to instruct the jury. * * *

The jury returned a verdict for the plaintiff and the defendants alleged exceptions.

AMES, J. According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well known exception of the act of God and of public enemies) the goods entrusted to him shall seasonably reach their destinations, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables and other perishable articles; the fermentation, evaporation or unavoidable leakage of liquids; the spontaneous combustion of some kinds of goods; are matters to which the implied obligations of the carrier, as an insurer, does not extend. Story on Bailments, §§ 492 a, 576. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from. the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect, as far as he can; but his liability, in such cases, is by no means that of an insurer.

Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers. They thereby became responsible for the safe treatment of the animals, from the moment they received them, until the carriages in which they were conveyed were unloaded. Moffat v. Great Western Railway Co., 15 Law T. (N. S.) 630. They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well known exception) affecting either the train generally or that

particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other. If the injury in this case was produced by the fright, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss. Clarke v. Rochester & Syracuse Railroad Co. 4 Kern. 570. Thus it has been held that if horses or other animals are transported by water, and in consequence of a storm they break down the partitions between them, and by kicking each other some of them are killed, the carrier will not be held responsible. Laurence v. Aberdein, 5 B. & Ald. 107. Story on Bailments, § 576, Angell on Carriers, 214 a. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question what was the cause of injury is one of fact for the jury. Hall v. Renfro, 3 Met. (Ky.) 51 And in a New York case, Conger v. Hudson River Railroad Co. 6 Duer, 375, Mr. Justice Woodruff says, in behalf of the court: "We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."

It appears to us therefore that the first instruction which the defendants requested the court to give should have been given. If the jury found that the defendants provided a suitable car, and took all proper and reasonable precautions to prevent the occurrence of such an accident, and that the damage was caused by the kicking of one horse by another, the defendants were entitled to a verdict. That is to say, they might be held to great vigilance, foresight and care, but they were not absolutely liable as insurers against injuries of that kind. As there was evidence also tending to show that the halter was attached by the plain-

tiff to the jaw of one of the horses in a manner which might cause or increase restiveness and bad temper, and also evidence that their shoes were not taken off, the defendants were entitled to the instruction that if the injuries were caused by the fault or neglect of the plaintiff in these particulars, he could not recover. This court has recently decided that for unavoidable injuries done by cattle to themselves or each other, in their passage, the common carrier is not liable. Smith v. New Haven & Northampton Railroad Co. 12 Allen, 531. This is another mode of saying that a railroad corporation, in undertaking the transportation of cattle, does not insure their safety against injuries occasioned by their viciousness and unruly conduct. Kendall v. London & Southwestern Railway Co. L. R. 7 Ex. 373. The jury should therefore have been instructed that if the injury happened in that way, and if the defendants exercised proper care and foresight in placing and securing the horses while under their charge, they are not to be held liable in this action. Upon this point the burden of proof may be upon the defendants, but they should have been permitted to go to the jury upon the question whether there had been reasonable care on their part.

It appears to us also that the instruction actually given was not a full equivalent for that which was requested, and which, as we have seen, should have been given. It was not necessary to the defense to show that the injury was caused in "an outburst of viciousness." The proposition should have been stated much more generally, and the jury should have been told that if from fright, bad temper, viciousness, or any other cause without fault on the part of the defendants, the horses became refractory and unruly, and the kicking and injury were occasioned in that manner, it was an unavoidable accident, for which the defendants were not liable.

Exceptions sustained.

MILTIMORE ET AL. v. CHICAGO, ETC., RY. CO., 37 Wis. 190.

(1875)

Action for damages alleged to have been caused by the negligence of the defendant company in transporting a wagon for the plaintiffs, on its cars from Janesville to Chicago. The an-

swer denied negligence, and alleged a special contract that the wagon should be transported wholly at the owners' risk in respect to the cause from which the the damage resulted.

The employes of the plaintiff loaded it upon the car. Two of the employes of the company went back, at Ripley's request, after hours, and helped load it; and one suggested that he take off the wheels, but Ripley said he could fasten them so they would not roll, and tied the wheels, and nailed down blocks upon the floor to keep it from rolling. The company gave a receipt for the wagon which contained the agreement that the company should not be "responsible for loss or damage to any * * * article whose bulk rendered it necessary to transport in open cars, * * * unless it can be shown that such damage or loss occurred through negligence or default of the agents of the company." The train, with the car containing the wagon, left for Chicago that evening while a high wind was prevailing. The wagon, being in the condition in which the plaintiffs' agent had left it, was blown off from the car in transit, and injured.

From judgment on the finding the defendant appealed.

COLE, J. The learned circuit judge found from the evidence that the defendant company was guilty of negligence in removing the wagon from Janesville, the place of shipment, and in carrying it forward toward Chicago, its point of destination, without taking the precaution to secure it to the car, so as to prevent it from being thrown from the car by the violence of the wind prevailing at the time. Upon this ground the company was held liable for the injury to the wagon upon being blown off the car.

We feel constrained to dissent from this view of the case. The evidence shows, beyond all doubt or question, that the plaintiffs themselves chose an open or platform car upon which to transport the wagon to Chicago. They did not wish to have the wagon taken apart so that it could be transported in a box car, but chose the platform car, upon which the wagon could be carried standing, as the cheaper mode of conveyance. The company certainly was not at fault for this manner of transporting the wagon. The evidence clearly shows that the plaintiffs assumed the labor and responsibility of loading the wagon. Ripley was told when he bargained for the car, by the agents of the company, that if he got the wagon to the cars before five o'clock, they would help him load it, but if he got there after that time,

he would find his car by the freight house platform, upon which to place the wagon. He got to the freight depot late, but met a couple of the workmen coming away, who went back and helped him in loading the wagon. But Ripley himself took the entire charge and responsibility of loading the wagon, as it was understood he would do, and of securing it to the car. Whatever means and appliances he deemed necessary and proper to be used to secure the property while in transit, he used, or might have used, without the control or interference of any one. The state of the weather, the nature of the property, its exposure to violent winds, he should have considered and provided for. It seems to us there is no reason for saying that the company was guilty of negligence, and did not take due precautions to secure the wagon, in view of the established fact that the plaintiffs undertook to attend to these matters themselves. The company received the property for transportation, loaded and secured as the plaintiffs saw fit to load and secure; and why should negligence be imputed to it for not taking precautions to guard against the plaintiffs' want of care? It is said the company was exceedingly careless and negligent in attempting to carry this covered wagon at the time and in the manner it did, without making any effort to attach the same more firmly to the car. But the obvious answer to this argument is, that the plaintiffs themselves assumed the risk and responsibility of loading and securing the wagon, and the company was not called upon to see that they had properly performed their duty in that regard. The plaintiffs had ordered that wagon should be sent by the night train, and the agents of the company had agreed to take it, if loaded. According to the testimony of Carter, one of the plaintiffs, the wind blew very hard between eight and nine, while the train on which the wagon was to go did not leave Janesville until 9:15. There was ample time to countermand the order to ship the wagon that night, or to see that it was so secured that it could not be blown from the car by the violence of the wind. It seems to us that whatever negligence there was in securing the wagon, must be imputed to the plaintiffs. The case is not distinguishable in principle from Betts v. The Farmers' Loan & Trust Company, 21 Wis. 81. and the decision there made is controlling here. There the owner of cattle shipped by railroad, who had undertaken to put them in the car, knew that the door of the car was in an unsafe con-

dition, but neglected to inform the station agent, who was ignorant of the fact: and it was held that he could not recover for injuries received by the cattle in escaping from the car in consequence of such defect. So, under the circumstances of this case, it seems to us, the company was not obliged to take further precautions to fasten or secure the wagon on the car. The plaintiffs had taken upon themselves that care and responsibility, and if they failed properly to secure it against the violence of the wind, and it was injured, the loss is attributable to their fault.

It follows from these views that the judgment of the circuit court must be reversed, and the cause remanded with directions to dismiss the complaint.

BY THE COURT.—It is so ordered.

HART v. CHICAGO, ETC., RY. CO., 69 Ia. 485.

(1886)

On the eighteenth day of April, 1883, plaintiff delivered to defendant, at the city of Des Moines, one carload of property, which the latter undertook to transport to the town of Miller, in Lakota territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain, a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered, and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than $100 each, unless by special agreement noted on the contract, and no such special agreement was noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to and did ride in the car with them. When the train reached Bancroft, in this state, it was discovered that the hay which was carried in the car to be fed to the horses on the trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The train-men and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This ac-

tion was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appealed.

REED, J. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the circuit court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction, but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation when the injury is caused by some act of the owner, but which is unattended by any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that the carrier ordinarily has the absolute possession and control of the property while it is in the course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. If it is lost or destroyed while in his custody, the policy of the law therefore imposes the loss upon him. Coggs v. Bernard, 2 Ld. Raym. 909; Forward v. Pittard, 1 Durn. & E. 27; Riley v. Horne, 5 Bing. 217; Thomas v. Railway Co., 10 Metc. 472; Roberts v. Turner, 12 Johns. 232; Moses v. Railroad Co., 24 N. H. 71; Rixford v. Smith, 52 N. H. 355. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should

be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong, and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr. § 216, and cases cited in the note; also Lawson, Carr. §§ 19, 23.

2. Section 1308 of the Code is as follows: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Counsel for plaintiff contend that the provision of the shipping contract by which plaintiff undertook to care for the horses while they were being transported is in violation of this section, and consequently is void. For the purposes of the case this may be conceded, and yet it does not follow that defendant is liable for the loss if it was caused by plaintiff's act. If it should be conceded that defendant was responsible for the proper care of the property while it was being transported, it would follow only that plaintiff was an intermeddler in placing his servant in the car, and in assuming to care for it. If the injury was caused by his act, it is immaterial whether he was proceeding under a valid contract or as an officious volunteer in doing the act.

3. The evidence tended to prove that two of the horses were worth $150 each, and that two others were worth $125 each, and that the others were worth $100 each. Defendant asked the circuit court to instruct the jury that under the contract defendant's liability for the horses could not exceed $100 per head. The

court refused to give this instruction; and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation, or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute above quoted prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule, or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport the property from this state into another state or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question by which it was sought to limit the liability of the defendant for the horses to an amount less than the actual value of the property is repugnant to its provisions, and consequently invalid.

It is contended, however, that the state has no power to place a restriction of that character upon the carrier who contracts for the transportation of property from this state into another state or territory. The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among the states, a subject which, under the federal constitution, is within the exclusive jurisdiction of the Congress of the United States. In our opinion, however, this proposition cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would ex-

empt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract; nor is any rule prescribed for his government respecting it. That it is within the power of the state to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the state in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the Supreme Court of the United States, in what are known as the Granger Cases. See Munn v. State, 94 U. S. 113; Chicago, B. & Q. Ry. Co. v. Iowa, Id. 155; Peik v. Chicago & N. W. Ry. Co., Id. 164.

The judgment of the circuit court will be reversed.

SCOVILL ET AL. v. GRIFFITH, 12 N. Y. 509.

(1855)

Action commenced in the supreme court in 1849 against the defendant as a common carrier to recover for his omission to transport to and deliver at Albany merchandise, shipped by the plaintiffs on board the defendant's boat at New York, consigned to Albany whereby, as the plaintiffs alleged, the property, being of the value of three hundred and twenty-four dollars, became lost to them, and, they also lost the benefit of the sale of the same to one Greenman, to their damage of one hundred dollars; the plaintiffs demanded judgment for four hundred and twenty-four dollars, being the amount of the value of the merchandise and the damages alleged to have been sustained by not selling it.

The court, among other things, charged the jury that if, from the testimony, they should find that there was an agreement by the defendant, or those whose acts would bind him, to carry the property in question to Albany, then a question arose as to the rule of damages. That mere delay, although unreasonable, did not make the defendant chargeable for the value of the goods. That in this case there was no claim that the property was injured or deteriorated by the delay. That if they had been materially injured or deteriorated, this might authorize an abandonment of them by the owner, and give the plaintiffs a right to charge the defendant for their value; but as it was, the rule

would be the difference between the highest market price of the goods, when or after they should have been delivered, and when they were actually tendered, and the expense the plaintiffs were put to by the delay. To this portion of the charge there was no exception.

The plaintiffs' counsel requested the judge to charge, that if there was an agreement to carry the goods to Albany, that unreasonable delay in the delivery of goods made the defendant liable to account for their full value; that the law imposed this liability upon common carriers, as a penalty for delay, although it might not be so with the other bailees. The court refused to so charge, and the counsel for the plaintiffs excepted. The jury rendered a verdict in favor of the plaintiffs for $10; and a judgment was rendered in favor of defendants for the amount of their costs, less the $10. This judgment was affirmed by the supreme court at a general term in the 1st district. The plaintiffs appealed to this court.

HAND, J. The jury have found the contract of bailment in this case, and assessed the damages for its violation by the defendant. As to the time in which his contract is to be performed, a common carrier is bound to use all reasonable diligence. That was not done in this case; and on the question of damages, the jury probably took a view of the circumstances very favorable to the defendant. But their verdict cannot be disturbed solely upon that ground. Nor did the judge err in the admission of evidence as to the circumstances under which the receipt was given. The proposition was not to vary or explain the terms of the receipt; and the defendant had a right to show, if such was the fact, that it was obtained from his agent or servant under such circumstances as did not bind him.

There was no exception to the charge as given; and the only question really arising on this bill of exceptions is, whether the judge should have told the jury that, if there was a contract to carry the goods to Albany, the plaintiffs were entitled, as a matter of law, to recover the full value of the goods on account of the delay. The plaintiffs asked for an unqualified charge on this point, without reference to the motives of the defendant, or any circumstances that might be supposed to explain the transaction. I think the judge could not have charged as requested. The plaintiffs state in their complaint that the property was wholly lost to them, and that they lost the sale to Greenman.

But the testimony does not sustain that allegation; not in a legal sense.

Before the Code, a good way of ascertaining legal obligations was by considering the remedies by which they were enforced. A supposed uniform and universal remedy in all cases has, in a measure, deprived us of these aids; but still some light may be obtained from analogy. This property was, from some cause, detained in Troy, some half dozen miles from Albany, about six weeks; and the defendant, during that time, made no effort to send it to its destination. This was inexcusable delay, and undoubtedly entitled the plaintiffs to all real damages sustained by them which were the natural consequence of the neglect. But it does not follow that the plaintiffs had a right to refuse and abandon the property and recover its full value. There is no evidence of a refusal to deliver, nor indeed that the plaintiffs ever demanded the property or gave the defendant notice that it had not been received. They were not bound to do either to give them a right of action. But the judge could not say to the jury, as matter of law, that there had been a conversion; nor does it appear that the property had deteriorated in condition or had seriously depreciated in value, nor was it lost. Where there has been a deterioration and loss, the carrier is liable. (Davis v. Garrett, 6 Bing., 716; Ellis v. Turner, 8 T. R., 531; Story on Bail., § 508.) In Ellis v. Turner, which was an action on the case, the carrier conveyed the goods beyond the place of destination, intending to deliver them on his return, but they were greatly damaged by the sinking of the vessel without any want of ordinary care or attention of the master or crew, and the carrier was held liable to make good the loss. Under the former system, to maintain trover against a carrier, there must have been an unjustifiable refusal to deliver or delivery to a wrong person, or sale or destruction, or some actual wrong or injurious conversion; something more than mere omission. (Packard v. Getman, 4 Wend. 613; Hawkins v. Hoffman, 6 Hill, 586; 2 Saund. R. 49, i. k. m.) It was not necessary that the wrong should be intentional; but, as a general rule, a mere nonfeasance did not and does not work a conversion. And indeed every unauthorized intermeddling with the property of another is not a conversion. It was held by the court of exchequer in England that the act of the ferry-man in putting the horses of the plaintiff on shore

out of his ferry-boat, though the jury should find it was done wrongfully, was not a conversion of the property, unless done with the intent to convert it to his own use or that of some third person, or unless the act had the effect to destroy it or change its quality. (Fouldes v. Willoughby, 8 M. & W. 540.) If it had appeared in this case that the defendant, from gross negligence, evincing a disregard of his contract and the rights of the plaintiffs, had carried the property by and on to another port, and had, with actual knowledge of all the facts, kept it several weeks, I am not prepared to say the jury might not have found that there was something more than omission, or that the evidence would not have sustained a verdict that the defendant was guilty of conversion, if rendered under a proper charge from the court. However, that point need not be decided here, for it was not raised upon the trial; the plaintiffs putting this part of their case upon the ground of mere delay, insisting that the defendant should pay for the property as a penalty for that delay, and thus, as it were, impliedly treating the case as a continuing bailment, rather than one of loss or actual conversion to the use of the defendant. If the facts of the case would not have sustained trover, the remedy would naturally have been an action of assumpsit or case; and the plaintiffs have not shown that they would have been entitled to recover for the full value of the property in either of those actions.

There were extra charges for taking the goods from Troy to Albany, but no demand therefor appears to have been made upon the consignee; and, besides, the refusal to receive them was not put upon that ground.

I think the judgment should be affirmed.

GEISMER v. LAKE SHORE, ETC., RAILWAY CO.,

102 N. Y. 563; 7 N. E. 828.

(1886)

Appeal from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made at the October term, 1884, which overruled defendant's exceptions and directed judgment for plaintiff on a verdict. (Reported below, 34 Hun. 50.)

This action was brought to recover damages for alleged negligence on the part of the defendant in the performance of a contract for transportation of live stock.

Upon the trial of this action there was evidence proving or tending to prove these facts: On the 21st day of July, 1877, the plaintiff delivered to the defendant, at Toledo, in the State of Ohio, a large number of cattle and hogs to be transported within a reasonable time over its railroad to Buffalo, in this State, there to be delivered to him. The usual and ordinary time for the transportation of such freight between the two places named was about twenty-five hours. The plaintiff's cattle and hogs were started on a train of defendant's cars for their destination, and were carried with reasonable dispatch and without delay as far as Collingwood, in the State of Ohio, where they arrived on the twenty-second day of July. * * * A few weeks prior to the arrival of the plaintiff's stock at Collingwood, the defendant made an order reducing the pay of its employes engaged on its trains and at their stations and shops ten per cent, and by reason of such reduction many of the employes refused to work on defendant's trains, or to permit others to work who were willing to. * * * Such persons boldly and defiantly refused to obey any of the orders of the defendant's officers, and refused to permit any of the defendant's trains to be moved, and threatened persons who should attempt to move any of the trains or cars until the demands of the strikers should first be complied with. The officers of the defendant made various attempts to move trains from Collingwood, and placed on the trains employes who were willing to work and operate the same; but they were prevented from moving the trains by threats, and were compelled to desist from all attempts to move them from Collingwood. * * * After the strike had continued for a period of eleven days it ceased, and all the late employes of the defendant who were engaged in the strike resumed work on the defendant's cars, and the defendant was restored to the possession of all its property and railroad and fixtures so taken possession of by the strikers; but the wages were not restored nor other concessions made by defendant. If it had not been for those who had been in the employ of the defendant up to the time of the commencement of the strike, the defendant could have overcome the resistance and transported plaintiff's stock in due and ordinary

time. As soon as the strike ceased the defendant transported the plaintiff's stock to Buffalo and there delivered it to the plaintiff, who took possession of it. The plaintiff suffered great damage from the delay, to recover which this action was commenced.

* * * The jury rendered a verdict for the plaintiff.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided. (Wibert v. N. Y. & Erie Railroad Co., 12 N. Y. 245; Blackstock v. N. Y. & Erie Railroad Co., 20 id. 48.)

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employes for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employes who were willing to serve

it. They became a mob of vicious law-breakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employes of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that they were not in its service or seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The mischief did not come from the strike—from the refusal of the employes to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employes who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. (Pittsburg & C. R. R. Co. v. Hogen, 84 Ill. 36; Pittsburgh, C. W. L. R. Co. v. Hallowell, 65 Ind. 188; Bennett v. L. S. & M. S. R. R. Co., 6 Am. & Eng. R. Cas. 391; I. & W. L. R. R. Co. v. Juntzen, 10 Bardwell, 295.)

The cases of Weed v. Panama R. R. Co. (17 N. Y. 362), and Blackstock v. N. Y. & Erie R. R. Co. (1 Bosw. 77; affirmed, 20 N. Y. 48), do not sustain the plaintiff's contention here. If in this case the employes of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited

for the maintenance of an action upon principles stated in the opinions in those cases.

We are, therefore, of opinion that this judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.[1]

LEDUC & CO. v. WARD, 20 Q. B. D. 475.

(1888)

Appeal by the defendants from the judgment of Denman, J., at the trial without a jury.

LORD ESHER, M. R. In this case the plaintiffs, the owners of goods shipped on board the defendants' ship, sue for nondelivery of the goods at Dunkirk in accordance with the terms of the bill of lading. The defense is that the delivery of the goods was prevented by perils of the sea. To that the plaintiffs reply that the goods were not lost by reason of any perils excepted by the bill of lading, because they were lost at a time when the defendants were committing a breach of their contract by deviating from the voyage provided for by the bill of lading. * * *

If the counsel for the defendants was right in his argument that there is no contract for any particular voyage in the bill of lading, just conceive what a state of things, in a business point of view, would result. The object of the carriage of the goods from port to port is that they may be sold or otherwise dealt with at the place of destination; and the person who wants them at that place for sale or use there acts upon the assumption that they will arrive there at or about a certain time in the ordinary course of a voyage there from the port of shipment. If the argument for the defendants were correct, he could not tell at what time he could calculate on having them. The indorsee of a bill of lading could not tell when he was likely to receive the goods. Business could not be carried on upon those terms.

Again, with regard to the insurance of goods, similar difficulties would arise. How could the goods be insured, if it was not known for what voyage they were to be insured? To suppose that there is no contract for a particular voyage in the bill of lading seems to me to be to disregard the whole course of

[1] 19 Harv. L. Rev. 54.

mercantile business. It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined; and accordingly it seems to me to be provided for in the bill of lading. The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with regard to the voyage so described?

A bill of lading is a common mercantile document, which has been used for hundreds of years, and I think that business men and courts of law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other. So here, if the description of the voyage had been merely from Fiume to Dunkirk, I think the contract would have been a voyage on the ordinary sea track of a voyage from Fiume to Dunkirk, and any departure from that track in the absence of necessity would be a deviation. Of course when I speak of the ordinary sea track I do not mean an exact line, for it would necessarily vary somewhat according to circumstances; the ordinary track for sailing vessels would vary according to the wind; the ordinary track for a steamer, again, might be different from that for a sailing vessel; I mean the ordinary track of such a voyage according to a reasonable construction of the term.

In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To "call" at a port is a well-known sea term; it means to call for the purposes of business, generally to take in

or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order; and therefore the words "in any order" are frequently added, but in any case it appears to me that the ports must be ports substantially on the course of the voyage.

It follows that, when the defendants' ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a voyage different from that contracted for to which the excepted perils clause did not apply; and therefore the shipowners are responsible for the loss of the goods. * * *

PALMER v. ATCHISON, ETC., R. R. CO., 101 Cal. 187.[1]

(1894)

SEARLS, C.—This action was brought to recover from defendant, a corporation and a common carrier, damages sustained by plaintiff by reason of the alleged failure of defendant to transport from Kansas City, Missouri, to San Diego, California, and deliver to the plaintiff within a reasonable time, five carloads of furniture. Plaintiff had a verdict for one thousand dollars, upon which judgment was entered. Defendant appeals from the judgment and from an order refusing a new trial. Plaintiff's recovery was founded upon the second count of his complaint. To this a demurrer was interposed which appellant contends should have been sustained, but which was overruled. The evidence shows without substantial contradiction that on the fifth day of January, 1888, a snowstorm of unprecedented severity commenced over the mountain region traversed by the Atlantic and Pacific railroad, which lasted for a period of ten days to two weeks, blocking the road and practically stopping the transportation of freight, during which time some six hundred and

[1] Abridged.

eighty-three loaded cars accumulated at Albuquerque and in its vicinity, with the result that when the road was again opened it was, say thirty days, before the accumulated freight was finally passed over the road.

There is no showing of delay upon defendant's road except as the cars were held by it at and near its western terminus because the Atlantic and Pacific could not receive and forward them.

"A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence." (Civ. Code, sec. 2196) "Accordingly it has been held that when the carrier's canal-boat was run into by a scow, which made it necessary for him to stop for repairs, the delay thereby occasioned was excusable. (Parsons v. Hardy, 14 Wend. 215); or when he was delayed by deep snow which made the road temporarily impassable. (Ballentine v. Pairroad, 40 Mo. 491; Breddon v. Railway Co., 28 L. J. Ex. 51; 32 L. T. 94); or the washing away of a bridge over a stream, which it was necessary for the carrier to cross, by a freshet. (Vicksburg etc. R. R. Co. v. Ragsdale, 46 Miss. 458.) So a railroad company will be excusable for delay in the delivery of goods, when, having running powers upon another road, it is obstructed by the negligence of the latter. (Livingston v. New York R. R. Co., 5 Hun, 562; Taylor v. Railway Co., L. H. I. Com. P. 385; Hutchinson on Carriers, sec. 331.)

The measure of liability of a common carrier of merchandise in case of its loss or injury is very different from that imposed upon him for delay in transporting and delivering such merchandise. In the former case he is liable for its value in any event, except from some inherent weakness, defect, or vice, or from the spontaneous action of the property itself, or the act of a public enemy or the act of the law, or "any irresistible superhuman cause." (Civ. Code, sec. 2194.) While for delay he is as before quoted, only liable for a want of ordinary care and diligence.

Railroad companies may bind themselves by contract not only to convey over their own but over connecting lines, and may bind themselves by contract to deliver goods within a given time. (Pereira v. Central Pacific R. R. Co., 66 Cal. 92); but in the absence of such contract, express or implied, they are only bound to transport them to the termini of their own lines and to

deliver them to the connecting carrier for transportation to their final destination, and that within a reasonable time. (Hutchinson on Carriers, secs. 102, 103 a, 145-159 b, 154, and cases cited)

The English courts hold that when goods are delivered to a railway company, to be transported beyond the terminus of its line by a connecting company, the presumption is that the company receiving them is liable for loss, injury, or delay occurring beyond its own line. (Muschamp v. Lancaster Ry. Co., 8 Mees. & W. 421, is the leading English case upon this question.)

The rule as enunciated in that case was that when the carrier accepts for carriage goods directed to a destination beyond its own route, it assumes, by the very act of acceptance, in absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed.

This rule has been steadily adhered to in the English courts. On the other hand, the majority of the American courts have held that in the absence of any other contract than that implied by an acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a delivery there to the next connecting carrier to further or complete the carriage, and that in order to be bound there must be a positive agreement, express or implied, extending the liability. (Nutting v. Connecticut R. R. Co., 1 Gray, 502; Gray v. Jackson, 51 N. H. 9 and cases cited.) From the review of the cases in Gray v. Jackson it will be seen that the rule is by no means uniform in this country. Our Civil Code has, however, settled the question in this state. Section 2201 is as follows: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

That there was no stipulation on the part of the defendant to be responsible beyond the terminus of its line, and that it expressly limited its liability to its own road, is attested by its receipt for the goods, which in such cases amounts to a bill of lading in which, as it might do, it expressly limited its liability to transportation over its own road. (Pollard v. Vinton, 105 U. S. 7; Hutchinson on Carriers, secs. 121, 122; Civ. Code, sec. 2176.)

The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view. (Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397; in re Missouri Steamship Co., L. R. 42 Ch. Div. 321; Hazel v. Chicago Ry. Co., 82 Iowa, 477; Fonseca v. Cunard Steamship Co., 153 Mass. 553.)

There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence.

Under such circumstances we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own. (Norris v. Harris, 15 Cal. 226; Hill v. Grigsby, 32 Cal. 56; Taylor v. Shew, 39 Cal. 540; Brown v. San Francisco Gas Light Co., 58 Cal. 426; Marsters v. Lash, 61 Cal. 622; Shumway v. Leakey, 67 Cal. 458.)

Judged by our own statute and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic and Pacific connecting road, within a reasonable time, plaintiff's goods.

This it is shown to have done, except as it was prevented without fault of its own by the inability of the Atlantic and Pacific Co., to receive them when they reached the terminus of defendant's line. That the delay was caused upon the Atlantic and Pacific road by act of God or "irresistible superhuman cause", is, we think, clearly established. The scintilla of evidence to the contrary is not sufficient to establish a substantial conflict; but waiving this question, the negligence, or want of it, on this defendant, under its contract, and the statute can be held liable.

It follows that the evidence is insufficient to justify the verdict, and it is against law.

The judgment and order appealed from should be reversed and a new trial ordered.

GREAT NORTHERN RY. v. SHEPHERD, 8 Exc. 30.

(1852)

PARKE, B. In this case, there being no special contract, the defendants were bound to carry the plaintiff and his luggage, which term, according to the true modern doctrine on the sub-

ject, comprises clothing and such articles as a traveler usually carries with him for his personal convenience; perhaps even a small present, or a book for the journey, might be included in the term; but certainly not merchandise or materials bought for the purpose of being manufactured and sold at a profit. Angell on Carriers, sec. 115; Story on Bailments. 526, 5th ed. note. In this case nine-tenths of the articles were of the latter description. Now, if the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight if the company chose to allow a passenger to carry more, they would be liable. The judge states, that there was no evidence as to whether defendants carried passengers by this excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, unless the court shall be of opinion that the fact that the charge for each passenger was less than a penny a mile was of itself sufficient proof that they carried upon those terms. That, however, it is not necessary to decide; because, assuming that they did not carry on those terms, the defendants only agreed for the stipulated fare to carry passengers and everything which constituted personal luggage, and were not bound to carry merchandise or articles wholly unconnected with luggage. If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the company were not aware that that he was not carrying luggage, and therefore the loss must be borne by him. It was contended that, after the accident happened, a new special contract was entered into, by which the company undertook to take care of the plaintiff's luggage. But this argument fails. If, indeed, an accident had happened to a perfect stranger, and the company had agreed without compensation to forward his luggage, they would, according to Coggs v. Bernard, be responsible for its loss.

But in this case the plaintiff was a passenger, and the intention of the company was only to carry into effect the original contract; and from that alone their obligation arises. I am therefore of opinion that the company are not liable; and the judgment of the court below must be reversed.

MACROW v. GREAT WESTERN RY. CO., L. R. 6 Q. B. 612.

(1871)

COCKBURN, C. J. This was an action brought by the plaintiff for compensation for the loss of luggage lost while traveling as a passenger on the defendants' railway. * * * A verdict passed for the plaintiff. * * *

The plaintiff had recently returned from Canada, with the intention of settling in England, but had not yet provided himself with a home. Amongst other articles which were in the box were six pairs of sheets, six pairs of large blankets, and six large quilts, which had formed part of his household goods in Canada, and which he intended to be again part of his household goods when he should have provided himself with a home. * * *

By the act of Parliament by which the company is constituted it is provided that passengers by the railway shall be entitled to have a fixed quantity of ordinary luggage, according to their respective classes, conveyed with them free of charge. See 9 & 10 Vict. c. 91, § 63.

The question for our decision is whether the articles of bedding hereinbefore referred to can be considered as ordinary passengers' luggage.

The impossibility of traveling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passengers, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger. Under the older system of traveling by stage coaches, canal boats, or other vessels, the amount of luggage to be thus carried free of

charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various acts of Parliament under which railways have been established.

The provision fixing the amount of luggage which the traveler shall be entitled to take with him free of charge has a twofold object: First, that of securing to the traveler the conveyance of a reasonable amount of luggage; secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as of entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute.

Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the Railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveler.

The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been coextensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes the personal charge of them, as in Talley v. Great Western Ry. Co., L. R. 6 C. P. 44, in which case other considerations arise.

On the other hand, the obligation of a railway company, or other carrier of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what properly falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely irrespectively of negligence, attaches.

It is necessary to state the proposition with this qualification; for, as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection

of the carrier, it follows that in either respect it may be waived by the latter; and, consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss though not arising from his negligence. * * *

While the authorities * * * establish that a passenger cannot claim to have carried as ordinary personal luggage articles unconnected with the personal use and convenience of the traveler, or, as in Hudston v. Midland Ry. Co., L. R. 4 Q. B. 366, of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying.

On the other hand, the term "ordinary luggage" being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier.

The articles as to which the question in the present case arises consisted of bedding. Now, though we are far from saying that a pair of sheets, or the like, taken by a passenger for his own use on a journey, might not fairly be considered as personal luggage, it appears to us that a quantity of articles of this description, intended, not for the use of the traveler on the

journey, but for the use of his household when permanently settled, cannot be held to be so.

We are, therefore, of opinion that the rule to reduce the damages in respect of these articles must be made absolute.

Rule absolute.

CLARK v. BURNS, 118 Mass. 275.

(1875)

Contract for the value of a watch against the owners of a steamship as common carriers. Counts in tort for negligence, and also counts charging them as innkeepers. The plaintiff, a passenger on defendants' transatlantic steamer, hung his waistcoat on a hook in his stateroom one evening as he went to bed, and left in the watch pocket a watch which he wore by day. Next morning the watch was missing. There was no means of fastening the stateroom door, which defendants' rules, as plaintiff had learned on previous voyages, forbade fastening, in order that stewards might at all times have access to the rooms.

The trial court ruled that plaintiff could not maintain the action. Plaintiff alleged exceptions.

GRAY, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Tower v. Utica Railroad, 7 Hill (N. Y.)

47, 42 Am. Dec. 36; Abbott v. Bradstreet, 55 Me. 530; Pullman Palace Car Co. v. Smith, 7 Chi. Leg. N. 237.

Whether the defendants' regulations as to keeping the doors of the staterooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was, taking the most favorable view for the plaintiff, a question of fact, upon which the decision of the court below was conclusive. Fox v. Adams Express Co., 116 Mass. 292.

Exceptions overruled.

PFISTER v. CENTRAL PACIFIC R. R. CO., 70 Cal. 169.

(1886)

SEARLS, C. This is an action to recover from the defendant, a corporation, engaged in the business of a common carrier of passengers and freight for hire by cars drawn over a railroad by steam-engines, damages in the sum of fifty thousand dollars for refusal to carry certain treasure for plaintiff.

Defendant interposed a demurrer to the complaint, which was sustained by the court, and the judgment, upon refusal by plaintiff to amend, was entered in favor of defendant, from which judgment this appeal is taken.

It appears from the complaint that the plaintiff was the county treasurer of the county of Santa Clara, and as such it was his duty to pay over and deliver to the state treasurer at Sacramento, California, certain funds due the state from him as such county treasurer.

On the nineteenth day of January, 1883, plaintiff purchased from the defendant at San Jose, in the county of Santa Clara, for sixteen dollars, four first-class passenger tickets, entitling four persons to first-class passage from said San Jose to Sacramento. Furnished with these tickets, plaintiff and three employes, having with them $91,952 in gold coin of the United States, contained in small leather satchels, which they carried in their hands, boarded a passenger train of defendant with such treasure, and were permitted by the conductor, who had knowledge of the contents of the satchels, to retain possession of and carry the same as far as Niles, a way-station on the railroad

leading to Sacramento, where it became necessary to change cars and take another train for the latter place.

The conductor of the train from Niles refused to permit plaintiff and his employes to enter the passenger car with their treasure, and required plaintiff, if he desired to carry said money to Sacramento, to deliver the same to Wells, Fargo & Co., an express company, engaged as common carriers for hire in the business of carrying treasure and that class of goods known as "express matter" over the railroad of defendant from San Jose to Sacramento, and to which company defendant had given the exclusive privilege of carrying money upon its trains from San Jose to Sacramento, so far as such money exceeded such sums as might be carried by a passenger traveling on its trains. * * *

The defendant was a common carrier of passengers and freight between San Jose and Sacramento, and upon receiving the reasonable and customary payment therefor, it was its duty to receive and carry upon its passenger trains all persons desiring to travel thereby, with a reasonable amount of luggage for each passenger without charge, except for an excess of weight over one hundred pounds. (Civ. Code, sec. 2180.) "Luggage may consist of any articles intended for the use of a passenger traveling or for his personal equipment." (Civ. Code sec. 2181.)

"The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property." (Civ. Code, sec. 2182.)

A common carrier by railroad must check and carry in a regular baggage-car the luggage of passengers over his road, and must deliver such luggage immediately upon the arrival of the passenger at his destination; and whenever the passengers neglect or refuse to have their luggage so checked and transported, it is carried at their own risk. (Civ. Code, sec. 2183.)

The question of whether money can or cannot be treated as luggage has been frequently determined by the courts, and usually to the effect that, except as to such limited amount as may be necessary for personal use to defray expenses of the passenger, it is not luggage. (Orange Co. Bank v. Brown, 9 Wend. 85; S. C., 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. 459; Miss. Cen. R. R. Co. v. Kennedy, 41 Miss. 671; Smith v. Boston & Maine R. R., 44 N. H. 325; Cin. & Chicago Air Line

R. R. v. Marcus, 38 Ill. 219; M. S. & N. I. R. R. Co. v. Oehm, 56 Ill. 293; Jordan v. Fall River R. R. Co., 5 Cush. 69; S. C. 51 Am. Dec. 44; Hawkins v. Hoffman; 6 Hill, 586; S. C. 41 Am. Dec. 767; Hickox v. Naugatuck R. R. Co. 31 Conn. 281; Hutchings v. Western etc. R. R. Co., 25 Ga. 61; S. C. 71 Am. Dec. 156.)

Some of the cases cited supra hold that neither money nor merchandise are included in the term "baggage." We do not find it necessary, however, to decide that precise point in this case. The terms "baggage" and "luggage" signify one and the same thing. The former is the term in general use in the United States, while in England the latter prevails. Our code has adopted the English expression.

We think it clear, alike from section 2181 of the Civil Code and from adjudicated cases, that money intended for trade or business or investment, or, as in this case, for transportation, and not intended for the use of the passenger while traveling, is not luggage.

It follows that the plaintiff and his employes had no right to transport as luggage the money in question upon the passenger and express train of defendant.

The right of plaintiff as a passenger must be determined by the contract he made with defendant.

He purchased four first-class passenger tickets from San Jose to Sacramento, which entitled him and his three employes to transportation in the first-class passenger-coaches of defendant between the points indicated, and gave to them a right to have their luggage, not exceeding one hundred pounds to each person, transported at the same time free of charge.

It gave to them no right to travel in a baggage, express, or freight car, but in the regular passenger-car or cars of the defendant and the contract gave to them no right to transport, either in their own charge or that of the defendant, any merchandise, or property not included in the term "luggage."

The law takes no note of what property a passenger carries upon his person, but beyond this he may not by virtue of his contract for passage carry either free of charge or by paying an extra charge property not included within the import of the term "luggage."

Were it otherwise, it would be within the power of the passenger to convert the passenger-coaches of a railroad company into vans for the transportation of merchandise, or to compel the carrier to do much the same thing by furnishing baggage-cars for the conduct of ordinary freight.

The orderly and expeditious transit of passengers and their baggage renders it necessary and proper for the carriers engaged in their transportation to run separate trains for their accommodation, or to furnish and transport them in cars separate from those devoted to the carriage of freight; and this result can only be accomplished by requiring the carrier on the one hand, and the passenger upon the other, to refrain from making passenger-cars the receptacle for merchandise.

Plaintiff must be presumed to know the legal effect of the contract he had made, and to be subject to its terms, conditions, and limitations equally with the defendant.

The fact that for ten years the defendant had permitted the county treasurers of Santa Clara county to carry with them upon its passenger trains the money which they were by law required to pay over to the state treasurer neither enlarged nor abridged the contract between it and the plaintiff.

If the defendant was not legally bound to extend this favor, its liberality to others or to plaintiff himself could not be urged as a binding rule for the continuance of such practice.

The theory of plaintiff, that by having accepted him as a passenger with knowledge of money he had with him the defendant became a common carrier of him and his money, though he retained possession of the latter, is not sustained by the authorities cited. (Minter v. Pacific R. R., 41 Mo. 504; Butler v. Hudson R. R. R. Co., 3 E. D. Smith, 571; Stoneman v. Erie R. R. Co., 52 N. Y. 429; Sloman v. G. W. R. Co., 67 N. Y. 208; and Hannibal R. R. Co. v. Swift, 12 Wall. 262,)—were all cases in which the property was delivered to the carrier, and although not baggage, it was held that, having received it with knowledge that it was not the ordinary traveling baggage of the passenger, the liability of the common carrier attached.

We are clearly of opinion that the defendant was under no obligation by virtue of its contract of passage with plaintiff as an individual to permit to carry with him in its passenger-

car the sum of money indicated in the manner indicated, and weighing, as it must have done, between three hundred and four hundred pounds. * * *

Under the circumstances presented by the complaint, was it the duty of defendant to extend like facilities to the plaintiff? * * *

The inconveniences which would follow from requiring railroad companies to extend equal express facilities to all persons, companies and corporations regularly engaged in the express business would be multiplied beyond measure were they, either with or without previous notice, required to furnish like accommodations to each individual who might at any time, and for a single trip, see fit to demand them.

Railroad companies owe important duties to the public, the discharge of which in their letter and spirit should be rigorously enforced by every department of the government to which authority in the premises is delegated, but to uphold the claim of plaintiff would establish a principle onerous to railroad companies and at the same time detrimental to the speedy and orderly conduct of a branch of the carrying trade in which the public is most concerned.

We are of opinion the demurrer to plaintiff's complaint was properly sustained, and that the judgment should be affirmed.

ADAMS v. NEW JERSEY STEAMBOAT CO., 151 N. Y. 163.

(1896)

O'BRIEN, J. On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of $160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person, who apparently reached it through the window of the room. The plaintiff's relations to the defendant as a passenger, the loss without negligence on

his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is whether the defendant is, in law, liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at General Term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. Story, Bailm. § 464; 2 Kent, Comm. 592; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest. * * *

It was held in Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part.

That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping-car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. * * *

But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. * * *

The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would perhaps be unjust to so extend the liability, when the nature and character of the duties which it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior water of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence. The judgment should be affirmed. All concur. Judgment affirmed.[1]

[1] McKee v. Owen, 15 Mich. 115 (1866); Mudgett v. Steamboat Co., 1 Daly, 151 (1861); Gore v. Transp. Co., 2 Daly, 254 (1867); Gleason v. Goodrich Trans. Co., 32 Wis. 85 (1873). But see Am. S. S. Co. v. Bryan, 83 Pa. 446 (1877); The Humboldt (D. C.) 97 Fed. 656 (1899); The R. E. Lee, 2 Abb. 49, Fed. Cas. No. 11,690 (1870).

Bicycle as baggage.—12 Harv. L. Rev. 119-126.

Ice as baggage, in street car.—23 Harv. L. Rev. 233.

Baggage retained in control of passenger.—25 Harv. L. Rev. 178, 186.

Baggage unaccompanied by owner.—10 Harv. L. Rev. 186; 17 Harv. L. Rev. 354; 20 Harv. L. Rev. 647.

Trunks of samples.—13 Harv. L. Rev. 304.

Sleeping cars liability for loss of baggage (like innkeeper).—Nashville, etc., Ry. Co. v. Lillie, 112 Tenn. 331 (1903). 3 Harv. L. Rev. 376, 377; 9 Harv. L. Rev. 429; 16 Harv. L. Rev. 367.

Obligations of carriers of live stock.—9 L. R. A. 449-451; 44 L. R. A. 289-296.

Delay.—Wyman, Public Service Corporations.—§§ 901-922; Bibb v. Atchison, etc., R. Co., 94 Minn. 264.

Railways cannot limit liability for delay if caused by negligence.—Gulf, etc., Co. v. Deiman, 81 S. W. R. (Tex.) 789.

Delivery. To whom delivery may be made.—1 L. R. A. 650; 37 L. R. A. 177-180; 38 L. R. A. 358-366.

Delivery of goods to consignee, without asking for "straight" bill of lading.—23 Harv. L. Rev. 146.

Waiver of action for delivery without taking up bill of lading.—20 Harv. L. Rev. 241.

Deviation.—Pierce v. Southern Pac. Co. infra.

Postmasters.—Ford v. Parker, 4 Oh. St. 576.

Action to recover $75 lost in a letter. Letter was received at the post-office at which Parker was postmaster. This was kept in a country store in a small village. No place was railed off for the post-office, and all the clerks in the store had access to the post-office. It was claimed that defendant himself was guilty of negligence in not providing a more suitable place. Court took that view.

Sawyer v. Corse, 17 Gratt. (Va.) 230.

Action against Sawyer, contractor for $968, lost by Fleming who was employed by the owner of the route to carry mail from Alexandria to Washington. Not within the rule of 7 Cranch. Proved on the part of plaintiff that Fleming had never been sworn—nothing more than a private agent. Therefore Sawyer was liable.

Public officers are not liable for the conduct of official subordinates. Postmasters and clerks are liable only for their individual negligence. The Government is not liable because it cannot be sued.

3. Rights of Common Carriers.

a. To Make Regulations.

PENN. COAL CO. v. DELAWARE, ETC, CANAL CO., 31 N. Y. 91.

(1865)

Davies, J. The defendant is the owner of a canal extending from tide water on the Hudson River, to the interior of the State of Pennsylvania. The plaintiff is the owner of extensive coal mines, bordering on the defendant's canal, which it mines for transportation to market. For such purpose, it is the owner of a large number of canal boats navigating the defendant's canal. By an agreement or deed, made and entered into between the parties to this action, dated 29th July, 1851, the defendant covenanted and agreed with the plaintiff, to furnish to any and all boats owned or used by the plaintiff for the purpose of transporting coal entering the said canal, by railroad connecting with the said canal.

The case was tried by the court without a jury, and the court found as a matter of fact, that the plaintiff had not proven a breach of the contract, and the court thereupon gave judgment for the defendant. The General Term, on appeal affirmed this judgment, and the plaintiff now appeals to this court.

Mullin, J. Two questions only are presented for consideration on this appeal. These are: 1st. Whether the contract between the parties had been violated. And if it has, then, 2d. Are the plaintiffs entitled to a specific performance of the contract.

1. Have the defendants broken the contract?

The defendants obligated themselves by the agreement to furnish to the plaintiffs' boats all the facilities of navigation and transportation which their canal should afford, when in good and navigable condition and repair, to boats owned or used by any other company or person, or owned or used by the defendants for the transportation of coal.

The contract, it will be perceived, is not, as the plaintiffs' counsel seems to construe it, that the defendants will afford to the plaintiffs' boats all the facilities of navigation that the canal, when in good order, shall afford, but it is to furnish all

the facilities to the plaintiffs that the canal, when in good order, shall afford to any other person's or company's boats, including defendants' own boats.

Before the plaintiffs can insist that the contract has been violated as to its boats, they were bound to show what facilities were afforded by the canal, when in good order, to other boats. No difference is shown to have been made between the plaintiffs' boats and those of other owners, in the facilities extended in the business of navigating the canal.

The defendants, as owners, had the right to prescribe such reasonable rules and regulations for the government of vessels passing along their canal, as their directors deemed best calculated to promote their own interests and the interests of those engaged in navigating the canal. Such regulations must embrace the order in which boats should pass through the locks. Such regulations, while resting largely in the discretion of the officers of the company, must, nevertheless, be reasonable. Now, it appears that all boats passing to the Hudson River, were locked through the Eddyville lock in the order of their arrival at such lock. This regulation is not complained of; but it is insisted that the same rule should be observed in locking up through the same lock the empty boats, and that the omission to do so is a breach of the agreement. It is claimed that the detention of plaintiffs' boats, if they first arrive at the lock, until boats of the defendants, subsequently arriving, are locked through alternately with plaintiffs', causes unreasonable delay, and is an unjust detention of the plaintiffs' boats.

When the plaintiffs' boats arrive at the lock first, it does seem to be oppressive to require any of them to be delayed until the boats of other persons, subsequently arriving, are locked through. But it must sometimes happen that the defendants' boats arrive first, and if they are delayed until the plaintiffs' boats, subsequently arriving, have been passed through, the plaintiffs have the benefit of the same rule which operated injuriously when their boats were first at the lock. While the rule is uniformly and impartially applied, it is difficult to see how it operates to the prejudice of the plaintiffs rather than to that of all others navigating the canal. While it is true that the plaintiffs owned the largest number of boats, it does not follow, nor is it proved, that their boats are uniformly first at the lock

on their way back to the mines. If they are not, then they must take the delay imposed upon them by the regulation in compensation for the benefit derived from passing alternately with boats arriving at the lock before those of the plaintiffs.

It does not appear that the regulation complained of was a new one. It may have been, and in the absence of both allegation and proof to the contrary, I think we are bound to presume that it had been in force from the making of the contract; and if so—if the plaintiffs had acquiesced in it for so long a time—it is somewhat late to complain of it.

If the regulation was designed to embarrass the plaintiffs, it is difficult to see why it should not have been applied to the boats coming to as well as to those going from the Hudson. There would seem to have been some reason for the discrimination, but what it is is not disclosed by the case.

A reason is suggested by the respondents' counsel which would seem to account for the regulation, and is probably the true one, and that is, that as but a single boat, or at most but a very limited number of boats is being laden at the same time, by either party, it is no cause of delay that the empty boats arrive one after the other, at intervals of twenty minutes; for if twenty or thirty boats arrive at one time, they must be detained until those ahead are loaded, and the result would be, that while nothing would be gained by the plaintiffs, considerable time would be lost by the other boats compelled to wait until all of plaintiffs' boats had passed through. By the regulation, it would seem that plaintiffs' boats are passed up as fast as they are required to be loaded, and that unnecessary delay to the defendants' boats is avoided.

A preference seems to be given to transient boats over those of either the plaintiffs or defendants. In what business these transient boats were employed, or their number, or who were the owners, does not appear. But it is probable that they were boats engaged in the transportation of property other than coal, and that the number was small compared with the number owned by the plaintiffs or defendants. If these conjectures are correct, they would account for the preference given to such boats in passing the lock. It would be very harsh to require a man, owning a single boat, to be detained until thirty or forty boats, arriving ahead of him, were got through the lock.

And, when a preference was given to one such boat, it became necessary to extend it to all, and it does not appear that the preference delayed the loading of any of the plaintiffs' boats. This delay, and not that at the lock, would be the cause of damage of which the plaintiffs could justly complain. If the boats, on arriving at their place of destination, would have been detained as long before being loaded as they lay at the lock, it is not perceived how the plaintiffs could be damnified.

In a word, the regulation is one that the defendants had the right to make; it is not shown to be either unreasonable or unjust, nor that it has been the cause of any real injury to the plaintiffs. It seems to have been acquiesced in for a long time, and no reason is perceived why it should now be repudiated or annulled. * * *

Judgment affirmed.[1]

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b. To Make Limitations by Contract.

HOLLISTER v. NOWLEN, 19 Wend. (N. Y.) 234.

(1838)

This was an action against the defendant as a common carrier for the loss of the plaintiff's trunk and contents. A case was agreed on between the parties stating the following facts:

The defendant was a member of a company, the proprietors of the three daily lines of stagecoaches running between Canandaigua and Buffalo, one of which was called the Telegraph line. * * * On the 20th July, 1833, before daylight in the morning, the plaintiff left Avon in the defendant's coach on his way to Buffalo. The trunk was placed in the boot behind the coach, which was carefully secured by strong leather covering, fastened with strong leather straps, and buckles, and was made secure against any loss except by violence. After proceeding about three miles is was discovered that the straps confining the cover of the boot had been cut, and the plaintiff's trunk with its contents had been feloniously stolen and carried off.

The Telegraph line was established in 1828. A public notice that baggage sent or carried in the Telegraph line would be at the risk of the owner thereof, printed on a large sheet, had

[1] 14 Harv. L. Rev. 227.

been uniformly kept placarded in most of the stage offices and public houses from Albany to Buffalo; and particularly such notice had been continually affixed up in the stage office and principal public houses at Utica, where the plaintiff had resided for the last three years before the trunk was lost. It was stipulated that should the court be of opinion that the plaintiff was entitled to recover, judgment should be entered in his favor for $116.75, and interest from July 20, 1833, besides costs.

BRONSON, J.

Can a common carrier restrict his liability by a general notice, in any form, brought home to the opposite party? * * * The doctrine that a carrier might limit his responsibility by a general notice brought home to the employer, prevailed in England for only a short period. In Smith v. Horne, 8 Taunt. 144, Burrough, J., said: "The doctrine of notice was never known until the case of Forward v. Pittard, 1 T. R. 27, which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall in 1804, when the case of Nicholson v. Willan, 5 East, 507, was decided. Lord Ellenborough said, the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied."

Whatever may be the rule where there is in fact a special contract, the learned judge could not have intended to say, that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched in vain to find one. Only eleven years before (in 1793), Lord Kenyon had expressly laid down a different rule in Hide v. Proprietor, etc. 1 Esp. R. 36. He said: "There is a difference where a man is chargeable by law generally, and where on his contract. Where a man is bound to any duty and chargeable to a cer-

tain extent by the operation of law, in such case, he cannot by any act of his own discharge himself." And he put the case of common carriers, and said, they cannot discharge themselves "by any act of their own, as by giving notice, for example, to that effect." This case was afterwards before the King's Bench, but on another point. 1 T. R. 389. * * *

The doctrine in question was not received in Westminster Hall without much doubt; and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common-law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision.

Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read—these and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. See 1 Bell's Com. 474. After years of litigation, Parliament interfered in 1830 and relieved both the courts and

the public, by substantially reasserting the rule of the common law. St. 1 Wm. IV, c. 68.

But, conceding that there may be a special contract for restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation not only to furnish the coat, but to do so at a reasonable price, no such implication could arise.

Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities.

Making a notice the foundation for presuming the special contract, is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing

a special contract for a restricted liability. But giving effect to the notice makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the onus of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

After all that has been or can be said in defence of these notices, whether regarded either as ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the Legislature, and not by the courts. It has been admitted over and over again by the most eminent English judges, that the effect given to these notices was a departure from the common law; and they have often regretted their inability to get back again to that firm foundation.

The doctrine that a carrier may limit his responsibility by a notice was wholly unknown to the common law at the time of our Revolution. It has never been received in this, nor, so far as I have observed, in any of the other states. The point has been raised, but not directly decided. Barney v. Prentiss, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670; Dwight v. Brewster, 1 Pick. (Mass.) 50. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence. * * *

Judgment affirmed.[1]

O'BRIEN v. GILCHRIST, 34 Me. 554.

(1852)

The defendant was master of the schooner Grecian. She was lying at the port of King William in Virginia. The plaintiff shipped on board of her a quantity of oak timber to go on freight to East Thomaston in Maine. The bill of lading, signed by the defendant, contained the following expressions:—

[1] Fish v. Chapman, supra.

"Shipped in good order and condition, by Seth O'Brien, in and upon the good schooner called the Grecian, whereof Cornelius Gilchrist is master for the present voyage, and now lying in the port of King William, and bound for East Thomaston, viz.:—

"Three hundred seventy-eight pieces of white oak ship timber, amounting to one hundred and thirty-four tons and thirty-two feet, more or less, and are to be delivered in the like good order and condition, at the said port of East Thomaston," etc.

The timber delivered at East Thomaston was but 351 pieces amounting to one hundred and twenty-three tons, making a deficit from the bill of lading of eleven tons and thirty-two feet. This controversy relates to that deficiency.

The defendant at the trial offered several witnesses to prove that there were not so many pieces nor so many tons received on board as is described in the bill of lading. The plaintiff objected to contradicting the bill of lading by parol, but the Court held that, so far as the bill of lading was in the nature of a receipt, it was very strong prima facie evidence of the truth of its recitals, but not conclusive; and it was therefore, as to the numbers and quantity, liable to be contradicted and overcome by oral testimony, and that as between the parties, all relevant evidence tending to show that the defendant was induced by misrepresentation or mutual mistake, to sign a bill of lading reciting a larger quantity than had in fact been delivered and received, would be proper for the consideration of the jury.

The verdict was for the defendant, and the plaintiff excepted.

APPLETON, J. That a receipt may be contradicted by parol evidence, has long been considered well settled law. The bill of lading, so far as regards the condition of the goods shipped, is prima facie evidence of a high nature, but not conclusive. Barrett v. Rogers, 7 Mass. 297. The master of a vessel is not authorized to open the packages to ascertain their condition. The principles of public policy and the convenience of transportation forbid that boxes, bales, etc., should be opened and inspected before receipted for by carriers. They therefore, may show that they were damaged before coming into their possession. Gowdy v. Lyon, 9 B. Mun. 113. The same rule of law has been applied to the quantity of goods therein stated as having been received for transportation. In Bates v. Todd, 1 M. & R. 106, Tindall,

C. J., said, that he was of opinion that, as between the original parties, the bill of lading is merely a receipt liable to be opened by the evidence of the real facts and left the question for the jury to determine what number of bags of coffee had been shipped. In Berkely v. Watting, 34 E. C. L. 22, it was held, that the defendants were not estopped by the bill of lading to show that goods purporting to be, were not in fact, shipped. In Dickerson v. Seelye, 21 Barb. 102, Edmonds, J., in delivering the opinion of the Court, says, "as between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt; that is, as to the quantity of goods shipped and the like; but as between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained." What may be the rights of an assignee under such circumstances it is not necessary to consider or determine here, as that question does not arise in the present case.

In Wayland v. Mosely, 5 Ala. 430, the Court says, "that a bill of lading in its character is twofold, viz.; a receipt and a contract to carry and deliver goods. So far as it acknowledges the receipt of goods and states their conditions, etc., it may be contradicted, but in other respects it is treated like other written contracts." In May v. Babcock, 4 Ohio, 334, the language of the Court is, that "a bill of lading is a contract including a receipt." The same doctrine in New York is likewise fully affirmed in Walfe v. Myers, 3 Sand. 7. The best elementary writers also concur in this view of the law. 1 Greenl. Ev. § 305; Abbott on Shipping, 324. The evidence, so far as relates to this question, was legally admissible and the instructions of the Court in relation thereto were in conformity with well established principles.

JUDSON v. WESTERN RAILROAD CORPORATION.

6 Allen (Mass.) 486.

(1863)

Contract in which the plaintiff seeks to charge the defendants as common carriers, for the loss of a quantity of dressed deer skins, which were in the defendants' freight depot at East Albany on the evening of the 5th of July, 1861, when it with all its contents was destroyed by an accidental fire.

At the second trial in the superior court, before Putnam, J., after the decision reported in 4 Allen, 520, there was evidence tending to show, and it was found by the jury, that on the afternoon of the 5th of July, 1861, two boxes, marked "G. C. Judson, Springfield, Mass., by railroad," were delivered by the New York Central Railroad Company to the defendants at East Albany, for immediate transportation, with the necessary vouchers and expense bills; and it further appeared that the defendants have for the past ten years issued freight tariffs, which were in force in July, 1861, containing among other provisions the following: "No risk assumed beyond $200 on any one package, except by special agreement. All goods and merchandise will be at the risk of the owners while in the corporation's storehouses, and no responsibility will be admitted for any loss or injury except such as may arise by fire from the locomotive engines, or by negligence of the agents of the corporation; nor for a greater amount than $200 on any one package, except by special agreement." These tariffs were posted in all the freight houses of the corporation, and liberally distributed to the public, and, before the 5th of July, 1861, a large number of these freight tariffs were delivered by the defendants to the freight agents of the New York Central Railroad Company at Albany. A notice similar to that contained in the freight tariffs was, and for many years had been, inserted in the printed receipts given for goods delivered at the several stations of the defendants for transportation, but the defendants did not propose to bring these notices home to the plaintiff in any other way than as above stated; and the plaintiff himself testified that he had never seen them, and was ignorant of their existence. * * *

The defendants requested the court to instruct the jury that the limitations and conditions contained in their tariff and freight receipts, brought home to the knowledge of the agents of the New York Central Railroad Company as above stated, would exempt them from all liability for the loss of the goods, or in any event would exempt them from liability beyond $200 on each parcel. The judge declined so to rule.

The jury returned a verdict for the plaintiff, with $1020.93 damages, and the case was reported for the consideration of this court. * * *

BIGELOW, C. J.

There is, however, one conclusion which is fully supported by the weight of authority in the American courts, concerning which no serious doubt can be entertained; that is, that a public carrier may enter into a special contract with his employer by which he may stipulate for a partial or entire exoneration from his liability at common law as an insurer of property committed to his custody, and that such contract is not contrary to public policy, or invalid as transcending the just limits of the right of parties to regulate their dealings by special stipulations. As a necessary corollary of his conclusion, it is also held in the best considered cases and by the most approved text writers, that a notice by a carrier that he will not assume the ordinary responsibility imposed on him by law, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him, will be binding and obligatory upon him, because it is tantamount to an express contract that the goods shall be carried on the terms specified in such notice. To this extent, the doctrine that a carrier may limit or modify his liability seems to be most just and reasonable. Inasmuch as the rule of law which holds a carrier to the responsibility of an insurer, except in certain special cases, is founded in a policy which is designed solely for the security and benefit of the owner of goods, there can be no sufficient reason for regarding the rule as absolutely inflexible or irrepealable, when the party, in whose favor it will operate, directly or by necessary implication consents to waive it, or agrees to an essential modification of his own rights under it.

But it is a very different proposition to asert that a common carrier may escape his legal liability or materially change it by a general notice to all persons that he will not be responsible for the loss or injury of property intrusted to his custody, or only liable therefor under such conditions and limitations as he may think proper to impose. A common carrier is in a certain sense a public servant, exercising an employment not merely for his own emolument and advantage, but for the convenience and accommodation of the community in which he pursues his calling. The law imposes on him certain duties and responsibilities different from and greater than those which attach to an occupation of a purely private nature, in regard to the conduct of which the public have no interest, and which can be carried on at the

option or according to the pleasure of the person who is engaged in it. A common carrier cannot legally refuse to transport property of a kind which comes within the class which he usually carries in the course of his employment, if it is tendered to him at a suitable time and place, with an offer of a reasonable compensation. Like an innkeeper, he is obliged to exercise his calling upon due request under proper circumstances, and is liable to an action for damages if he wrongfully refuses to do so. A legal obligation rests upon him to assume the duty which he holds himself out as ready to perform, and a correlative right belongs to the owner of goods to ask for and require their reception and transportation upon the terms of liability fixed and defined by the established rules of law. The carrier has not the option to accept or refuse the carriage of the goods at his pleasure; but the person seeking to have them transported can choose whether they shall be carried without any restriction of the carrier's duty as prescribed by law, or whether he will waive a portion of his rights, and consent to a modification of the legal liability which attaches to the carrier. Such being the legal relation which subsists between a common carrier and his employer, it certainly would be inconsistent with it to hold that a carrier, by a mere notice brought home to the owner of goods intrusted to his care that he did not intend to assume all the liabilities of his calling, could escape or materially change the responsibility which the law annexes to the contract of the parties. It would in effect put it in the power of the carrier to abrogate the rules of law by which the exercise of his employment is regulated and governed. Certainly such a notice, even if shown to have been within the knowledge of the owner of goods, would, in the absence of evidence of his direct assent to its terms, afford no sufficient ground for the inference that he had voluntarily agreed without any consideration to relinquish and give up the valuable right of having his goods carried at the risk of the carrier. On the contrary, it would be quite as reasonable to infer under such circumstances that the carrier did not intend to rely upon a notice upon which he could not legally insist, as that the owner of goods meant to surrender a right to which he was entitled by law. In such case, mere silence cannot be said to amount to acquiescence. The leading cases in the American courts in which these doctrines have been recognized and established are New Jersey Steam Naviga-

tion Co. v. Merchants' Bank, 6 How. (U. S.) 344; Farmers' & Mechanics' Bank v. Champlain Transportation Co., 23 Verm. 186, 205; Kimball v. Rutland & Burlington Railroad, 26 Verm. 247; Moses v. Boston & Maine Railroad, 4 Fost. (N. H.) 71. See also the recent English case of Garton v. Bristol & Exeter Railway, 1 Best & Smith, 112, 161.

The application of these principles to the present case is decisive against the rights of the defendants to insist on the instructions for which they asked at the trial. It is not contended that the plaintiff had any actual knowledge of the notice issued by the defendants, containing a limitation of their common law liability as carriers. If he had any knowledge at all, it was at most only constructive, through the New York Central Railroad Company, who received the goods for transmission over their own road, to be delivered to the defendants to be forwarded over a portion of their route. There is no fact in the case from which any assent by the plaintiff to the terms of the notice can be inferred. One portion of the notice on which the defendants rely goes to the extent of repudiating all liability for the loss or injury of goods delivered to the defendants and in process of transportation, except such as might be caused by fire from the locomotive engines or by the negligence of the agents of the corporation. This certainly was not binding on the plaintiff. Equally invalid was that portion of the notice which announced that the defendants would not be liable for a greater amount than two hundred dollars on any one package, except by special agreement. This was equivalent to a notice that they would not be liable for a greater amount than two hundred dollars on a single package, unless they chose to assume a further liability. It was optional with them, under this notice, whether they would make any such agreement or not. If they refused or omitted to do so, the owner of goods had no power to compel them to enter into any agreement. Nor, if the notice of itself is binding on him, had he any means of obtaining the safe transportation of his goods by the defendants above the value of two hundred dollars, under the liabilities imposed by law upon common carriers.

We do not mean to say that a general notice brought home to an owner of goods may not be available to qualify and limit the responsibility of common carriers to a certain extent and within certain limits. Doubtless they may by such a notice require that

information shall be given to them of the nature and value of property which they are required to carry, in order that they may exercise a needful degree of care in its transportation, and may ascertain and demand a reasonable sum for its carriage. So they may give notice that property above a certain amount in value will not be transported for ordinary rates of freight, but that the price for its carriage will be regulated by the nature of the articles and the aggregate value of each package. In like manner they may by a general notice protect themselves against liability for loss or injury of merchandise, unless it is properly packed or arranged for transportation, so that it may with reasonable diligence and care be safely and securely carried. These and other similar notices would be reasonable and perfectly consistent with the nature of the employment of a common carrier, and the rules of law by which it is regulated, and they would be valid and binding on all to whom they were brought home, without any express assent. All that we mean to decide is, that a common carrier cannot by a general notice exonerate himself entirely from his legal liability, nor limit it absolutely to a certain amount beyond which he will not be held responsible in case of injury or loss. This was the legal effect of the notice on which the defendants rely in the present case, as is admitted by their counsel, who puts his defense to this action on the ground that they are not liable at all, or only for the sum of two hundred dollars on each package. Such a notice, being invalid, was not binding on the plaintiff, and he is therefore entitled to judgment on the verdict.[1]

GRACE v. ADAMS, ETC., 100 Mass. 505.

(1868)

Contract, against the defendants, who carried on business under the name of the Adams Express Company, to recover the value of a package of money. In the superior court, judgment was ordered for the plaintiff on agreed facts, and the defendants appealed. The agreed facts were as follows:

"It is agreed that the plaintiff delivered to the Adams Express Company, as common carriers, at Wilmington, in the State of North Carolina, March 21, 1865, a package containing one hun-

[1] McMillan v. Michigan, etc., R. Co., infra (1867).

dred and fifty dollars, directed to Patrick Corbett, Taunton, Massachusetts; that the said Express Company shipped said package with other packages from Wilmington by the steamship General Lyon, which ship was accidentally burnt at sea, and said package thereby destroyed; that the plaintiff delivered the package and took the bill of lading, a copy of which is annexed, he did not read the same."

The material parts of the bill of lading, of which the copy was annexed, were as follows:

"Upon the special acceptance and agreement that this company is not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, * * * occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. For the company. Robinson."

COLT, J. It is to be received as now settled by the current and weight of authority, that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire, occurring without fault on his part. It is not necessary to discuss here, how far in this or other respects he may escape those liabilities which the policy of the law imposes, by mere notices brought home to the employer, or whether the effect of such notices may not be held to vary according as it is attempted to avoid those extraordinary responsibilities which are peculiar to common carriers, or those other liabilities under which they are held in common with all other bailees for hire. Judson v. Western Railroad Co., 6 Allen, 486. York Co. v. Central Railroad Co., 3 Wallace, 107. Hooper v. Wells, 27 Calif. 11; and see article by Redfield, with collection of authorities, 5 Am. Law Reg. (N. S.) 1.

It is claimed here that the shipping receipt or bill of lading constituted a valid and binding contract between the parties, and that, upon the loss at sea of the plaintiff's package in the course of its transportation under the contract, by an accidental fire, the defendants were discharged from any obligation to the plaintiff in regard to it; and the Court are of opinion that this claim must be sustained.

The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and condi-

tions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper. The case of Rice v. Dwight Manufacturing Co. 2 Cush. 80, 87, is an authority in point. In an action to recover for work done, the defense was that the work was performed under a special contract, and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, but which was not signed by either party. The plaintiff denied knowledge of its contents; but it was said by Forbes, J., that **where a party enters into a written contract, in the absence of** fraud he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. See also Lewis v. Great Western Railway Co. 5 H. & N. 867; Squire v. New York Central Railroad Co. 98 Mass. 239.

This case, then, is brought within the rule which authorizes carriers to relieve themselves from losses of this description by express contracts with the employer. It differs from the cases of Brown v. Eastern Railroad Co. 11 Cush. 97, and Malone v. Boston & Worcester Railroad Co. 12 Gray, 388. The limitation relied on in both those cases was in the form of a notice printed on the back of a passenger ticket, relating to baggage; and it was held that there was no presumption of law that the party, at the time of receiving the ticket, had knowledge of the contents of the notice. It is obvious that in those cases the ticket was not designed to be held as the evidence of the contract between the

parties. The contract, which was of passenger transportation, was not attempted to be set forth. At most, it was but a check, to be used temporarily and then delivered to the conductor as his voucher, with these notices on the back. The presumption that every man knows the terms of a written contract which he enters into, therefore, did not apply. Nor was the acceptance of the ticket conclusive evidence of assent to its terms.

The recent case of Buckland v. Adams Express Co. 97 Mass. 124, requires notice, because, upon a case in most respects similar to this, a different result was reached by the Court. The legal principles upon which that case was decided are those here stated. It was a case upon an agreed statement of acts; and the difference resulted in the application of the law to the facts then presented. It is to be noticed that the receipt containing the limitation relied on was in that case delivered to a workman in the employ of a stranger, who, so far as it appears, had, in that particular instance only, been requested by the plaintiffs to deliver the parcel in their absence, and as a mere favor to them. And it further appeared that the previous course of dealing between the parties was such that, in a majority of instances in which the plaintiffs had employed the defendants to transport like packages, no receipt was made out, and no special contract insisted upon. Under such circumstances, it was held that it could not fairly be inferred that the plaintiffs understood and assented to the contents of the receipt as fixing the terms on which the defendants were to transport the merchandise, or that the workman had authority to make an unusual contract.

The same remarks apply to the case of Perry v. Thompson, 98 Mass. 249, which is to be distinguished from the case at bar by the fact that, in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability having been given, and by the further fact that, when the notice in that instance was received, the printed parts of it were so covered up by the revenue stamp affixed to the receipt that it could not be read intelligibly.

So in Fillebrown v. Grand Trunk Railway Co. 55 Maine, 462, it was held that, when a verbal contract for transportation was made without restriction, its legal effect would not be changed by the conditions in a receipt which was subsequently given to the clerk of the consignor, who delivered the goods at the sta-

tion, but who had no express authority either to deliver or to contract with the defendants.

These cases do not reach the case at bar, where the delivery of the receipt was directly to the plaintiff; nor would they be held decisive in a case where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportation. Squire v. New York Central Railroad Co. 98 Mass. 239.

Judgment for the defendants.

THE DELAWARE, 14 Wall. (U. S.) 579.

(1871)

Appeal from the Circuit Court for the District of California; the case being thus:

The Oregon Iron Company, on the 8th of May, 1868, shipped on board the bark Delaware, then at Portland, Oregon, 76 tons of pig-iron, to be carried to San Francisco, at a freight of $4.50 a ton. The bill of lading was in these words:

"Shipped, in good order and condition, by Oregon Iron Company, on board the good bark Delaware, Shillaber, master, now lying in the port of Portland, and bound to San Francisco, to say seventy-five tons pig-iron, more or less (contents, quality, and weight, unknown), being marked as in the margin, and are to be delivered in like good order and condition at the aforesaid port of San Francisco, at ship's tackles (the dangers of the seas, fire, and collision excepted) unto ——, or assigns, he or they paying freight for the said goods in the United States gold coin (before delivery, if required), as per margin, with 5 per cent. primage and average accustomed.

"In witness whereof the master or agent of said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Vessel not accountable for breakage, leakage, or rust.

C. E. Shillaber,
"For the captain.

Portland, May 8th, 1868."

The iron was not delivered at San Francisco; and on a libel filed by the Iron Company, the defense set up was that by a verbal agreement made between the Iron Company and the master of the ship before the shipment or the signing of the bill of lading, the iron was stowed on deck, and the whole of it, with the exception of 6 tons and 90 lbs., had been jettisoned in a storm.

On the trial, the owners of the vessel offered proof of this parol agreement. The libellants objected, and the court excluded the evidence on the ground that parol proof was inadmissible to vary the bill of lading, and decreed in favor of the libellants for the iron that was thrown overboard. On appeal the case was disposed of in the same way in the Circuit Court. It was now here; the question being as in the two courts below, whether in a suit upon a bill of lading like the one here for non-delivery of goods stowed on deck, and jettisoned at sea, it is competent in the absence of a custom to stow such goods on deck, to prove by parol a verbal agreement for such a stowage.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Ship-owners, as carriers of merchandise, contract for the safe custody, due transport and right delivery of the goods; and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges; and by the maritime law, as expounded by the decisions of this court, the obligation of the ship-owner and the shipper are reciprocal, and it is equally well settled that the maritime law creates reciprocal liens for the enforcement of those obligations, unless the lien is waived by some express stipulation, or is displaced by some inconsistent and irreconcilable provision in the charter-party or bill of lading. Shippers should in all cases require a bill of lading, which is to be signed by the master, whether the contract of affreightment is by charter-party or without any such customary written instrument. Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate, or other person in charge of the deck, and acting for the carrier, to give a receipt for the parcels as they are received, and when the whole consignment is delivered, the master, upon these receipts being given up, will sign two or three, or, if requested, even four bills of lading in the

usual form, one being for the ship and the others for the shipper. More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent or factor, and he should always retain one for his own use. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport, and right delivery of the same, upon the terms, as to freight, therein described, the extent of the obligation being specified in the instrument. Where no exceptions are made in the bill of lading, and in the absence of any legislative provisions prescribing a different rule, the carrier is bound to keep and transport the goods safely, and to make right delivery of the same at the port of destination, unless he can prove that the loss happened from the act of God or the public enemy, or by the act of the shipper or owner of the goods. Stipulations in the nature of exceptions may be made limiting the extent of the obligation of the carrier, and in that event the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument; and in view of that fact the better description of the obligation of such a carrier is that, in the absence of any Congressional legislation upon the subject, he is in the nature of an insurer, and liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Seventy-five tons of pig-iron were shipped by the libellants, on the 8th of May, 1868, on board the bark Delaware, then lying in the port of Portland, Oregon, to be transported from that port to the port of San Francisco, for the freight of four dollars and fifty cents per ton, to be delivered to the shippers or their assigns at the port of destination, they paying freight as therein stipulated, before delivery if required, with five per cent. primage and average accustomed. Dangers of the sea, fire and collision were excepted in the bill of lading, and the statement at the close of the instrument was "vessel not accountable for breakage, leakage, or rust."

Process was served and the claimant appeared and filed an answer, in which he admits the shipment of the iron and the execution of the bill of lading exhibited in the record. Sufficient also appears in the record to show that the voyage was performed and that but a small portion of the iron shipped, to wit, some thirteen or fourteen thousand pounds, was ever delivered to the consignees, and that all the residue of the shipment was thrown overboard as a jettison during the voyage, which became necessary by a peril of the sea, for the safety of the other associated interests and for the preservation of the lives of those on board. Sacrificed as all that portion of the shipment was as a jettison in consequence of a peril of the sea, excepted in the bill of lading, the claimant insists that the libellants have no claim against the ship, and that libellants as the shippers of the iron must bear their own loss.

Evidence was exhibited by the claimant sufficient to show that the allegations of the answer that the iron, not delivered, was sacrificed during the voyage as a jettison in consequence of a peril of the sea are true, but the libellants allege that the iron was improperly stowed upon the deck of the vessel, and that the necessity of sacrificing it as a jettison arose solely from that fact, and that no such necessity would have arisen if it had been properly stowed under deck, as it should have been by the terms of the contract specified in the bill of lading. That the iron not delivered was stowed on deck is admitted, and it is also conceded that where goods are stowed in that way without the consent of the shipper the carrier is liable in all events if the goods are not delivered, unless he can show that the goods were of that description, which by the usage of the particular trade, are properly stowed in that way, or that the delivery was prevented by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier and expressly excepted in the bill of lading.

Goods, though lost by the perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by the perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it ap-

pears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law.

Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not contribute both to the disaster and to the loss of the goods.

None of these principles are controverted by the claimant, but he insists that the iron not delivered was stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the iron was sent on board, and before the bill of lading was executed by the master. Pursuant to that theory testimony was offered in the District Court showing that certain conversations took place between the consignee of the bark and the agent of the shippers tending to prove that the shippers consented that the iron in question should be stowed on the deck of the vessel. Whether any express exception to the admissibility of the evidence was taken or not does not distinctly appear, but it does appear that the question whether the evidence was or was not admissible was the principal question examined by the District Court, and the one upon which the decision in the case chiefly turned. Apparently it was also the main point examined in the Circuit Court, and it is certain that it has been treated by both sides in this court as the principal issue involved in the record and in view of all the circumstances the Court here decides that it must be considered that the question as to the admissibility of the evidence is now open for revision, as the decree for the libellant was equivalent to a ruling rejecting the evidence offered in defense or to a ruling granting a motion to strike it out after it had been admitted, which is a course often pursued by courts in cases where the question deserves examination. What the claimant offered to prove was that the iron was stowed

on deck with the consent of the shippers, but the libellants objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libellants, which was equivalent to a decision that the evidence offered was incompetent. Dissatisfied with that decree the respondent appealed to the Circuit Court, where the decree of the District Court was affirmed, and the same party appealed from that decree and removed the cause into this court for re-examination.

Even without any further explanation it is obvious that the only question of any importance in the case is whether the evidence offered to show that the iron in question was stowed on deck with the consent of the shippers was or was not properly rejected, as it is clear if it was, that the decree must be affirmed; and it is equally clear, if it should have been admitted, that the decree must be reversed.

Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or to the parties therein designated. Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on these goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise

to transport and deliver the same as therein stipulated. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts.

Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent. Proof of fraud is certainly a good defense of an action claiming damages for the nondelivery of the goods, but it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck, and that it is the duty of the master to see that the cargo is so stowed and arranged that the different goods may not be injured by each other or by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper. Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master,

except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies. Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law. Cases may arise where such evidence may be admissible and material, but as none such was offered in this case it is not necessary to pursue that inquiry. Exceptions also exist to the rule that parol evidence is not admissible to vary or contradict the terms of a written instrument where it appears that the instrument was not within the statute of frauds nor under seal, as where the evidence offered tends to prove a subsequent agreement upon a new consideration. Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether. Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that

effect the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt himself or the vessel from liability, in the case of loss, by virtue of the exception, of dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment.

Decree affirmed.

EXPRESS COMPANY v. CALDWELL, 21 Wall. (U. S.) 264.

(1874)

Error to the Circuit Court for Western District of Tennessee.

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee, places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to, the package whatever, unless claim should be made therefor within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than ninety days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

MR. JUSTICE STRONG delivered the opinion of the court.

Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers,

and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable—if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. Common carriers do not deal with their employers on equal terms. There is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact they are without competition, except as between themselves, and that they are thus is in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than

there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal a fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of the goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In York Company v. The Central Railroad Company, it is ruled that the common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, Railroad Company v. Lockwood, where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exemption stipulated for, but it unequivocally accepted the rule asserted in the first-mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence,

or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in Railroad Company v. Lockwood. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels easily lost or mislaid and not easily traced. They carry them in large numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and

furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy.

Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf v. The Western Union Telegraph Company, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in Young v. The Western Union Telegraph Company.

In Lewis v. The Great Western Railway Company, which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage, or detention would be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered." Under the last clause of

this condition the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company, within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed. But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defense to the action.

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

Judgment reversed, and the cause remanded for further proceedings, in conformity with this opinion.

SHELTON v. MERCHANTS' DISPATCH CO., 59 N. Y. 258.

(1874)

Appeal from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was against defendant as a common carrier, for failure to deliver goods intrusted to it for transportation.

The referee found the following facts:

That on the second day of October, 1871, the plaintiff purchased at the city of New York, of the firm of H. B. Claflin & Co., a quantity of goods, and directed them to ship the same to him at Janesville, Wisconsin, by the defendant's line. The goods so purchased were packed by Claflin & Co., were by them marked "H. S. Shelton, Janesville, Wis.," and were, on the same day, by them delivered to the defendant, at its depot in the city. At the time of such delivery, H. B. Claflin & Co. received from the defendant three receipts. (A copy of one is contained in opinion.) On the third and fourth days of October, Claflin & Co. presented the receipts at the general office of the defendant, and on the same or following day received bills of lading in the usual and customary form, given by defendant. They contained this clause:

"To be forwarded in like good order (dangers of navigation, collisions and fire, and loss occasioned by mob, riot, insurrection or rebellion, and all dangers incident to railroad transportation, excepted), to Chicago depot only, he or they paying freight and charges for the same as below."

It was the usual custom of said H. B. Claflin & Co. to mail receipts or bills of lading to their consignees.

The packages aforesaid were safely and with all due care and diligence transported to Chicago, and arrived there, a part in the evening of Saturday, the seventh day of October, and the remainder thereof on the morning of Sunday, the eighth day of October, and were, upon their arrival, unloaded into a freight house used by the defendants. In the evening of the eighth, a great fire occurred in Chicago, without fault or negligence on the part of the defendant; that said packages and their contents were consumed and entirely destroyed, without negligence of any kind on the part of the defendant.

JOHNSON, J. The referee refused to find that, previous to the shipment in question, H. B. Claflin & Co. had been large shippers by the defendant's line, and had always been accustomed to obtain bills of lading for the goods shipped; and also that the defendants were carriers upon a route terminating at Chicago, and not extending to Janesville, Wisconsin; and that be-

tween the latter points transportation had to be performed by separate and independent carriers. These matters the referee refused to find, on the ground that they were immaterial to the rights of the parties. In this we think he erred, and for the following reasons: Claflin & Co. were the agents of the plaintiff in respect to the transportation of the goods in question. His directions to them were to ship the goods to him at Janesville, Wisconsin, by the defendant's line. The extent of the authority thus conferred was considered in Nelson v. Hudson River Railroad Company (48 N. Y., 498). It necessarily extends to the making of such contracts as the agents, in the honest exercise of their discretion, see fit to make.

The fact that the carriers and the agents employed have a habitual course of dealing in respect to contracts for transportation, is a material and important element in determining the construction to be put on their acts in any particular case. (Mills v. Mich. Cent. Railroad, 45 N. Y., 622.) The delivery by the agents of the plaintiff, to the carriers, was made upon no particular agreement made at the time. The packages were marked with the address of the plaintiff, and receipts were signed by the agents of the defendants, at their receiving depot at New York. These receipts were in a bound receipt book belonging to Claflin & Co., filled up by them, and signed by the agents of the defendants. They purport to be receipts, and not contracts for carriage. They were in the following form: "New York, Oct. 2, 1871. Received from H. B. Claflin & Co. in good order on board the M. D. for —— the following packages, one case D. G. marked H. S. Shelton, Janesville, Wis." and were signed "Gleason." In a day or two, but after the packages had been started on their way, the agents of the plaintiff, acting in accordance with the habitual mode of doing this business, sent the receipts to the defendant's office, and procured bills of lading for the goods, the giving of which was entered on the several receipts. These bills of lading expressed the actual contract of carriage between the parties who in fact made the contract, the defendants on the one hand, and H. B. Claflin on the other. When the goods were delivered and the primary receipts given, each of the parties was acting in a habitual method, and with a habitual understanding of what they were engaged in doing. The receipts were presented and signed with the view and expectation, on

both sides, that bills of lading were in the usual course to be subsequently issued, expressing the intentions and engagements of the parties. This was their method of dealing, distinctly in their contemplation from the beginning, reasonable in itself and completely within the authority committed by the plaintiff to his agents, H. B. Claflin & Co. Any attempt on their part to claim a different agreement would have been an act of bad faith; because it would have been a departure from the understanding based upon the previous course of dealing with these parties. In the view we take of the relations and acts of these parties, the matters of fact which the referee held to be immaterial were plainly material, because they were essential to the disclosure of the actual contract of the parties. The bills of lading were obtained by the plaintiff's agents, in the exercise of their original authority to contract with the defendants for transportation, and these controlled the rights of the parties and displaced the common-law relation which otherwise might have existed between them.

The order of time in which the business was actually transacted cannot be allowed to affect the rights of the parties. If H. B. Claflin & Co. were originally authorized to ship on bills of lading limiting the common-law liability of the defendants, the fact that receipts were taken in one stage of the business, intended by neither party as completing their dealing or contract, did not exhaust the authority. It was never so intended and cannot have that effect. The acts of the parties must have operation as they were intended by the parties when they were done. The bills of lading excepted the risk of fire, and as it was by that danger that the property in question was destroyed, the defendants are free from liability, at least unless the loss was due to their negligence or fault. * * *

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

SHAW v. RAILROAD CO., 101 U. S. 557.

(1879)

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On Nov. 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft—the original bill of lading still being attached thereto—to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather, that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the

cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine,—

1st, Whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading.

2d, Whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Ersey thereupon sued out this writ of error.

MR. JUSTICE STRONG delivered the opinion of the court.

The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these

circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; i. e., by endorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a bona fide holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defence which

might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instruments in favor of bona fide holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of mala fides will defeat his right. The rule is the same as that

which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Ad. & E. 870; Goodman v. Simonds, 20 How. 343; Murray v. Lardner, 2 Wall. 110; Matthews v. Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank note (Miller v. Race, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in Peacock v. Rhodes (2 Doug. 633), to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promis-

sory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice on non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in Goodman v. Harvey, Goodman v. Simonds, Murray v. Lardner (supra), and in Phelan v. Moss (67 Pa. St. 59), is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

Judgment affirmed.

POLLARD v. VINTON, 105 U. S. 7.

(1881)

Error to the Circuit Court of the United States for the District of Kentucky.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams, & Co., at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for $5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs, who sued out the present writ.

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense.

It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowl-

edgement of the receipt of property on board his vessel by the owenr of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment.

It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders on such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the shipowner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

It we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence:—

"During the month of December, 1873" (the date of the bill of lading), "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat, 'Ben Franklin.'"

This authority to execute and deliver bills of lading has two limitations; namely, they could only be delivered to shippers, and

they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean, that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and agents of defendant had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of Schooner Freeman v. Buckingham, 18 How. 182.

In that case the schooner was libeled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libellants, who resided in the city of New York, had advanced money to the consignee of these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libellants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner, of the vessel could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel; and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfully bind a vessel or its owner.

The court, in further discussing the question, says: "Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

The court cites as settling the law in this way in England the cases of Grant v. Norway, 10 C. B. 665, Coleman v. Riches, 16 id. 104, Hubbersty v. Ward, 8 Exch. Rep. 330, and Walter v. Brewer, 11 Mass. 99. See also McLean & Hope v. Fleming, Law

Rep. 2 H. of L. (Sc.) 128; Maclachlan's Law of Merchant Shipping, 368, 369.

It seems clear that the authority of E. D. Cobb & Co., as shipping agents, cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very questions of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice.

The case of New York & New Haven Railroad Co. v. Schuyler (34 N. Y. 30) is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of pure agency, and depends solely on the power confided to the agent.

In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think that case presents a rule for this case.

Judgment affirmed.

GRAVES ET AL. v. LAKE SHORE, ETC., CO., 137 Mass. 33.

(1884)

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of $20 per bbl., owner's risk of leakage." It also contained the agreement, that, "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule, that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into

contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried: this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. Dunlap v. International Steamboat Co. 98 Mass. 371. Judson v. Western Railroad, 6 Allen, 486.

The plaintiffs admit that their valuation of the goods would be conclusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken by them; they deliberately represented the value of the goods to be $20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation,

if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he entrusts to the carrier, should not be bound by his valuation. M'Cance v. London & North Western Railway, 7 H. & N. 437; S. C. 3 H. & C. 343. Railroad v. Fraloff, 100 U. S. 24. Muser v. Holland, 17 Blatchf. C. C. 412; S. C. 1 Fed. Rep. 382. Hart v. Pennsylvania Railroad, 2 McCrary, 333; S. C. 7 Fed. Rep. 630. Magnin v. Dinsmore, 70 N. Y. 410.

We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than $20 per barrel.

Judgment affirmed.

HART v. PENN. R. R. CO., 112 U. S. 331.

(1884)

Lawrence Hart brought this suit in a State court in Missouri, against the Pennsylvania Railroad Company, to recover damages from it, as a common carrier, for the breach of a contract to transport, from Jersey City to St. Louis, five horses and other property. The petition alleges that, by the negligence of the defendant, one of the horses was killed and the others were injured, and the other property was destroyed, and claims damages to the amount of $19,800. After an answer and a reply, the plaintiff removed the suit into the Circuit Court of the United States for the Eastern District of Missouri, where is was tried by a jury. * * *

At the trial the plaintiff put in evidence the bill of lading, and gave testimony to prove the alleged negligence and how the loss and injury occurred. He then offered to show that the actual value of the horse killed was $15,000; that the other horses were worth from $3,000 to $3,500 each; and that they were rendered

comparatively worthless in consequence of their injuries. The defendant objected to this testimony, on the ground that it was not competent for the plaintiff to prove any damages or loss in excess of that set out in the bill of lading. The court sustained the objection and the plaintiff excepted. It appeared, on the trial, that the horses were race-horses, and that they and the other property were all in one car.

It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed in the bill of lading. * * *

The errors assigned are, that the court erred in refusing to permit the plaintiff to show the actual damages he had sustained, and in so charging the jury as to restrict their verdict to $1,200.

MR. JUSTICE BLATCHFORD delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. * * * If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load." Then follow in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring, or smothering, nor for the loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control

of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live stock contract," and is confined to live stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation if fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability has been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on

that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carirer may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; York Co. v. Central R. R. Co., 3 Wall. 107; Railroad Co. v. Lockwood, 17 Wall. 357; Express Co. v. Caldwell, 21 Wall. 264; Railroad Co. v. Pratt, 22 Wall. 123; Bank of Kentucky v. Adams Express Co., 93 U. S. 174; Railway Co. v. Stevens, 95 U. S. 655.

In York Co. v. Central Railroad, 3 Wall. 107, a contract was upheld exempting a carrier from liability for loss by fire, the fire not having occurred though any want of due care on his part. The court said, that a common carrier may "prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter."

In Railroad Co. v. Lockwood, 17 Wall. 357, the following propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable, in the eye of the law; (2) It is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (3) These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The basis of the decision was, that the exemption was to have applied to it the test of its justness and reasonable character. It was said, that the contracts of the carrier "must rest upon their fairness and reasonableness;" and that it was just and reasonable that carriers should not be responsible for losses happening by sheer accident, or chargeable for valuable articles liable to be damaged, unless apprised of their character or value. That case was one of a drover traveling on a stock train on a railroad, to look after his cattle, and having a free pass for that purpose, who had signed an agreement taking all risk of injury to his cattle and of personal injury to himself, and who was injured by the negligence of the railroad company or its servants.

In Express Co. v. Caldwell, 21 Wall. 264, this court held, that an agreement made by an express company, a common carrier in the habit of carrying small packages, that it should not be held liable for any loss or damage to a package delivered to it, unless claim should be made therefor within ninety days from its delivery to the company, was an agreement which the company could rightfully make. The court said: "It is now the settled law, that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." It was held that the stipulation as to the time of making a claim was reasonable and intrinsically just, and could not be regarded as a stipulation for exemption from responsibility for negligence, because it did not relieve the carrier from any obligation to exercise diligence, fidelity and care.

On the other hand, in Bank of Kentucky v. Adams Express Co., 93 U. S. 174, it was held that a stipulation by an express company that it should not be liable for loss by fire could not be reasonably construed as exempting it from liability for loss by fire occurring through the negligence of a railroad company which it had employed as a carrier.

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise

have bestowed. 2 Kent's Comm. 603, and cases cited; Relf v. Rapp, 3 Watts & Sergeant, 21; Dunlap v. International Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24. This qualification of the liability of the carrier is reasonable and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in the case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

This principle is not a new one. In Gibbon v. Paynton, 4 Burrow, 2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the

proprietor that there was money in the bag. The defense was upheld, Lord Mansfield saying: "A common carrier in respect of the premium he is to receive runs the risque of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is Batson v. Donovan, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in Newburger v. Howard, 6 Philadelphia Rep. 174; Squire v. New York Central R. R. Co., 98 Mass. 239; Hopkins v. Westcott, 6 Blatchford, 64; Belger v. Dinsmore, 51 N. Y. 166; Oppenheimer v. United States Express Co., 69 Ill. 62; Magnin v. Dinsmore, 56 N. Y. 168, and 62 Id. 35, and 70 Id. 410; Earnest v. Express Co., 1 Woods, 573; Elkins v. Empire Transportation Co., 81* Penn. St. 315; South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606; Same v. Same, 56 Id. 368; Muser v. Holland, 17 Blatchford, 412; Harvey v. Terre Haute R. R. Co., 74 Missouri, 538; and Graves v. Lake Shore Ry. Co., 137 Mass. 33. The contrary rule is sustained in Southern Express Co. v. Moon, 39 Miss. 822; The City of Norwich, 4 Ben. 271; United States Express Co. v. Backman, 28 Ohio St. 144; Black v. Goodrich Transportation Co., 55 Wis. 319; Chicago, St. Louis & N. O. R. R. Co. v. Abels, 60 Miss. 1017; Kansas City &c., Railroad Co. v. Simpson, 30 Kansas, 645; and Moulton v. St. Paul &c., R. R. Co., 31 Minn. 85. [of Alair v. Railroad, 53 Minn. 160. Ed.] We have given consideration to

the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute.

As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, "shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered." The principle of this statute is in harmony with the decision at which we have arrived.

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which

the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire v. New York Central R. R. Co., 98 Mass. 239, 245, and cases cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is affirmed.

SPRAGUE v. MISSOURI PAC. RY. CO., 34 Kan. 347, 8 Pac. 465.

(1885)

JOHNSTON, J. S. Sprague brought this action in the district court of Cloud county against the Missouri Pacific Railway Company. * * * Among the stipulations of the contract is the following:

"And for the consideration before mentioned said party of the second part further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the place of delivery of the same to the said party of the second part, and before such stock is mingled with other stock." * * *

Upon the trial it was expressly admitted that the special contract set up in defendant's answer was signed and executed by the duly-authorized agents of the parties; and it was further admitted that if the plaintiff is entitled to recover under the contract for the injuries alleged by the plaintiff, the amount of such recovery should be $300. Testimony was then offered by the plaintiff to the effect that the horses were in good condition when delivered to the railway company at Atchison, Kansas. His brother was given a free pass over the road, and accompanied the train upon which the horses were shipped for the purpose of caring for the stock while it was being transported over the defendant's road. At several points on the route he inspected them and found them to be still in good condition. At the station named "Palmer," some distance east of Con-

cordia, the horses were again examined by the plaintiff's brother, and were then all right; and that after returning to the caboose, and before leaving the station, he felt several jars, but was unable to state what occasioned them, or whether the horses were injured thereby. Upon arriving at Clifton, the next station, he again examined the horses and found that some of them were lying down and apparently injured. He then demanded of the conductor that the car in which the horses were shipped should be backed up to the stock yards in order that the horses might be removed from the car. This was done, when the horses were unloaded and found to be considerably bruised. He then refused to reload the horses upon the car, took possession of them, and caused them to be taken across the country to the plaintiff's farm, which was not far distant. The plaintiff further testified that when the car reached Concordia, he paid the price agreed upon for the transportation of the same; but that no notice has ever been given to the conductor of that train, or to any officer or agent of the railway company, prior to the commencement of this action, that he claimed any damages for the injury to his stock; that he knew the condition of the horses, and the extent of the injury to them, before they were taken to the farm, and yet he had not given any notice of any claim therefor.

When the plaintiff closed his testimony the railway company interposed a demurrer to the evidence, which the court, after consideration, sustained. Upon this ruling the plaintiff raises and discusses several questions here, but as one of them disposes of the case the others require no attention. If the contract of the parties is to be upheld, by which it was agreed that before the plaintiff could recover damages for any injury to his horses he must give notice in writing of his claim therefor to some officer of the railway company, or to its nearest station agent, before the horses were removed from the place of destination, or from the place of the delivery of the same to the plaintiff, and before they were mingled with other stock, then the demurrer to the evidence was rightly sustained, and the judgment should be affirmed.

The plaintiff contends that the agreement is not binding upon him, because it is not one permitted by the laws to be made, and for the further reason that it is without consideration. As a general rule common carriers are held liable as insurers, and are absolutely responsible for any loss to the property intrusted

to them, unless such loss is occasioned by the act of God or the public enemy. It is now a well-established rule of law that this liability may be limited to a certain extent; but to accomplish this it must clearly appear that the shipper understood and assented to the limitation. Common carriers are not permitted, by agreement or otherwise, to exempt themselves from liability for loss occasioned by their negligence or misconduct. Such limitations are held to be against the policy of the law, and would be void. But it is no longer questioned that they may, by special agreement, stipulate for exemption from the extreme liability imposed by the common law, provided that such stipulations are just and reasonable and do not contravene any law or a sound public policy. That the agreement in question was executed by the plaintiff is admitted, not only by the pleadings, but it was expressly agreed to by him upon the trial. There is no pretense that any deceit or fraud was practiced upon him by the railway company in obtaining his assent to the agreement. So far as appears in the testimony it was fairly and understandingly entered into and executed. His authorized agent, who accompanied the horses, and who had them in charge while passing over defendant's road, knew of this provision of the contract, and was acquainted with the condition of the stock before they were taken from the possession of the railway company. And the plaintiff, with full knowledge of this requirement, paid the freight charges agreed upon after the injury had been done without complaint, and without claiming any damages therefor, and gave no notice, nor did he make any claim for damages prior to the commencement of this action.

The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence, or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause. After the property has been taken from their possession and mingled with other property of a like kind, the difficulty of inquiring into the circumstances and character of the injury would

be very greatly increased. That such a provision does not contravene public policy, and that it is just and reasonable, has been expressly adjudicated by this court. In Goggin v. Kansas Pac. Ry. Co., 12 Kan. 416, a limitation substantially like the one in question was under consideration, and the circumstances of that case were much like those of the present one. It was there, as here, urged, in support of the reasonableness and justice of the regulation, that the defendant was, at the time of the alleged injury, engaged in transporting great numbers of cattle and horses over its line of road, and which were being shipped to different points thereon, and that it would have been impossible for it to have distinguished one carload from another, unless its attention was called immediately thereto, and that the object of the notice and demand mentioned in the contract was to relieve it from any false or fictitious claim, and to give it an opportunity to have an inspection of the stock before they were removed or mingled with others, and the company could thus have an opportunity to ascertain and allow the actual damages suffered. These reasons are said to be cogent; and the agreement is there held to be reasonable, just and valid. The decision in that case governs the one at bar, and the view which we have taken of the validity of this limitation accords with the decisions of other courts, among which the following may be cited: Rice v. Kansas Pac. Ry. Co., 63 Mo. 314; Oxley v. St. Louis, K. C. & N. Ry., 65 Mo. 629; Express Co. v. Caldwell, 21 Wall. 264; Dawson v. St. Louis, K. C. & N. Ry. Co., 76 Mo. 514; Texas Cent. Ry. v. Morris, 16 Amer. & Eng. R. R. Cas. 259, and cases there cited.

The plaintiff makes the further objection to the special agreement that it is without consideration. It appears that the rate to be paid for the car in which the horses were shipped was omitted from the contract, and the plaintiff urges that as the price is not stated, it does not appear that any concession or reduction was made from the established rates, and therefore there was no consideration for the stipulation in question. But that position cannot be maintained. The contract was in writing, and signed by the parties to be bound thereby, and by virtue of our statute it imports a consideration. Gen. St. c. 21, § 7.

If more was needed to show that the objection is not well founded, it might be found in the plaintiff's petition, where he

alleges that the contract was based upon a valuable consideration, and in his testimony, where it appears that $30 was the rate agreed upon, and the amount that was paid by him under the contract. When these things were taken in connection with the statement in the written contract that the price agreed upon was a reduction from the established rates; the consideration for the stipulation in question is sufficiently shown. It follows from what has been said that the judgment of the District Court should be affirmed.

(All the justices concurring.)

THE GARDEN GROVE BANK v. THE HUMESTON & S. RY. CO., 67 Iowa, 526; 25 N. W. 761.

(1885)

The plaintiff seeks to recover of the defendant the sum of $550 which it advanced upon a bill of lading issued by the defendant upon the shipment of certain walnut lumber, and which bill of lading was assigned to the plaintiff. The right of action is based upon the claim that the defendant failed to comply with its contract of shipment, and by negligence delivered the lumber to parties not authorized to receive the same, by which the plaintiff was damaged in the amount advanced, and interest. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

ROTHROCK, J. The facts necessary to a determination of the questions of law involved in the case are not disputed. They are as follows: One Henry Zohn was engaged in buying walnut logs and walnut lumber along the line of the railroad of the defendant, and shipping the same to Chicago. About the twentieth day of August, 1881, he caused three cars to be loaded with said lumber, for shipment, at Van Wert, a station on the defendant's railroad. Zohn was indebted to Wells Bros. in the sum of $550 for this lumber, and on the twenty-third day of August, 1881, before any bill of lading was issued for the shipment of the property, Wells Bros. caused the lumber on said cars to be attached to secure their claim against Zohn. On the same day Wells Bros. and Zohn met at said station, and agreed that the bill of lading should be issued to Wells Bros. as consignors, that they should hold it as security for their claim against

Zohn, and that they should take such bill of lading to the Garden Grove Bank, and draw a sufficient amount of money thereon to pay the claim of Wells Bros. The conversation in regard to this arrangement was in the presence of the station agent of the defendant, and he knew, when he issued the bill of lading, that Zohn and Wells Bros. expected and intended to use the same at the Garden Brove Bank to draw or receive money thereon. The said agent thereupon issued and delivered to Wells Bros. a bill of lading. * * *

This bill of lading was issued and delivered on the evening of the twenty-third day of August. On the next morning Wells Bros. and Zohn appeared at the Garden Grove Bank, and requested the cashier to advance them $550 on said bill of lading. He consented to do so. Thereupon Wells Bros. assigned the bill of lading to Zohn, and he assigned the same to C. S. Stearns, cashier of the bank, and at the same time Zohn executed a draft of $550 in favor of said cashier to one J. H. Wallace of Chicago, and the bill of lading, and draft attached thereto, were delivered to the cashier, in consideration whereof he advanced and paid for said bank to Wells Bros. the sum of $550.

It will be observed that there is no person named as consignee in the bill of lading. The space under the head of "Marks and Consignees" is left blank. The defendant introduced parol evidence by which it was shown that, when the bill of lading was issued, the name of the consignee was intentionally omitted, because Zohn had not then determined to whom he would ship the lumber. He did not intend to return to Van Wert, and he directed the station agent to ship to Stokes & Son, of Chicago, unless he received other instructions from him by telegraph. No such instructions were received, on the next day, being the same day the plaintiff advanced the money on the bill of lading, the agent of the railroad company shipped the lumber consigned to Stokes & Son, to whom the same was delivered, and it was shipped immediately to Canada. The plaintiff forwarded the bill of lading and draft to Chicago and demanded the lumber of the C., B. & Q. R. Co., the railroad connecting with defendant, and delivery was refused, because a delivery had already been made to Stokes & Son. Wells Bros. knew of the arrangement between the station agent and Zohn, that the lumber was to be consigned to Stokes & Son unless Zohn should name another

consignee; but this arrangement was wholly unknown to the plaintiff until it was too late to prevent the delivery of the lumber to Stokes & Son.

The plaintiff objected to the parol evidence on the ground that it contradicted the written contract as evidenced by the bill of lading. The objection was overruled and the evidence received, and the court instructed the jury as follows: "(4) You are instructed that the bill of lading, as shown upon its face, does not name a consignee, and does not express the full agreement between the parties; and you are instructed that if Zohn and Wells Bros. consented that at the time the waybills should be made to Stokes & Son, unless the agent should be advised to the contrary, then it was proper for the said agent to ship said lumber to Stokes & Son, and your verdict should be for the defendant. But if there was no such agreement, then the bill of lading is a contract between the parties thereto, whereby said defendant agreed to transfer said lumber to Chicago to Wells Bros. or their assignee. The burden of proof is upon the defendant to establish said agreement. (5) If you find that Wells Bros. and Zohn went to the bank of plaintiff, in order to get money so that Wells Bros.' claim could be satisfied, and you further find that Wells Bros. assigned their interest to said Henry Zohn, that then Zohn drew a draft on Chicago upon said Wallace, which said draft was cashed by the plaintiff, and Zohn then assigned and delivered the bill of lading to the plaintiff, then you are instructed that it was the duty of the plaintiffs, in order to protect their rights, to notify the defendant that they were the owners of said bill of lading; and if you find that the defendant shipped said lumber to Stokes & Son, and said consignment was with the consent of Zohn, and he was satisfied with such assignment, and you further find that the defendant did not know that said bill of lading had been assigned to plaintiff, and had no knowledge of plaintiff's rights, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

These instructions are complained of by counsel for appellant, and, in connection with the admission of the parol evidence, they present the questions which, in our opinion, are decisive of the rights of the parties. A bill of lading is both a receipt and a contract, and in its character as a contract it is no more open

to explanation or alteration by parol than other written contracts. This proposition seems to be conceded by counsel for appellee; and the court below, in the fourth instruction cited above, appears to have been of the opinion that, as the contract did not name any one as consignee, it shows upon its face that it does not express the full agreement between the parties, and the parol evidence was doubtless admitted upon the ground that the contract was partly in writing and partly in parol. It is, however, conceded in the same instruction that, if it was not agreed by parol that Zohn should designate the consignee, then the bill of lading is a contract whereby the defendant agreed to transfer the lumber to Chicago to Wells Bros. or to their assignees. We think the proposition that the bill of lading shows on its face that it is an obligation to convey the property to Chicago and deliver to Wells Bros., or the assignees, is correct, and that it is a complete and valid contract not susceptible of explanation by parol, notwithstanding the space left in the instrument for the name of the consignee does not contain the name of any person. It was an obligation to deliver the goods to Chicago to the "consignee or owner." Wells & Co., according to the contract, were consignors, consignees, and owners. In Chandler v. Sprague, 5 Metc., 306, it is said: "Ordinarily the name of a consignee is inserted, and then such consignee or his indorsee may receive the goods and acquire a special property in them. Sometimes the shipper or consignor is himself named as consignee, and then the engagement of the ship-owner or master is to deliver them to him or his assigns. Sometimes no person is named; the name of the consignee being left blank, which is understood to import an engagement on the part of the master to deliver the goods to the person to whom the shipper shall order the delivery, or to the assignee of such person;" citing Abb. Shipp., (4th Amer. Ed.) 215. See, also, City Bank v. Railroad Co., 44 N. Y. 136; Low v. De Wolf, 8 Pick. 101; Glidden v. Lucas, 7 Cal. 26. In Hutchinson on Carriers, § 134, it is said: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee, and vest the property in him, the shipper may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has

been forwarded to the consignee first named, or to some one for his use. [Citing Blanchard v. Page, 8 Gray, 285; Mitchell v. Ede, 11 Adol. & E. 888; and other cases.] But, after the carrier or his agent has given one bill of lading or receipt for the goods, he cannot give another, unless the first and all duplicates of the same have been returned to him."

The reason of this rule is obvious. An assignment of a bill of lading operates as a transfer of the title to the property therein described. As is said in Meyerstein v. Barber, L. R., 2 C. P. 45; "While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading represents them; and this indorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." Now, it is perfectly manifest that if a carrier may issue a second bill of lading without requiring the return of the first, no reliance can be placed upon any such an instrument by those dealing with the consignor with reference to the property. And the same consequences would ensue if he should be permitted, without the surrender of a bill of lading to ship the property to any one other than that named in the instrument. In view of the well-known fact that the live-stock, grain, and other products of this country are paid for upon advancements made upon bills of lading, just as was done in this case, the interests of commerce seem to require that the rule that no alteration shall be made in contracts of this character without the production of the original should be strictly enforced. The defendant appears to have had due regard to this rule when preparing its blank bills of lading. The last provision therein contained, to-wit, "This bill of lading to be surrendered before property is delivered," was printed across the face of the instrument. It is claimed by counsel that this part of the contract was no part of the mutual obligation, but that it was a provision for the protection of the defendant which it might well waive. It is true, it could, as it did in this case, deliver the property without the surrender of the bill of lading. But it did so at its peril. This bill of lading was issued with a full knowledge that it was intended to procure an advancement of money upon it; but, whether the agent had such knowledge or not, third persons dealing with Wells & Co. were justified in believing that their

assignee would receive the property upon the surrender of the instrument.

It is claimed, however, that the court below seems to have been of the opinion, that because a bill of lading is not negotiable the defendant had the right to ship the property to Stokes & Co. by the direction of Zohn, and is not liable to the plaintiff because it had no notice that the bill of lading had been assigned to plaintiff. It is true that a bill of lading is not negotiable. It is, however, assignable, and the assignor may maintain an action thereon in his own name. It possesses attributes not common to the ordinary non-negotiable instruments enumerated in section 2084 of the Code. The instruments there enumerated are obligations for the payment of money, or promises to discharge obligations or debts by the delivery of property. Such obligations may be assigned, but they are "subject to any defense or counterclaim which the maker or debtor had against any assignsignor thereof before notice of his assignments."

It is claimed that the defendant, under this statute, may avail itself of any defense it could have interposed against Zohn, because he was the assignor of the plaintiff. A bill of lading is a different character of instrument. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can only be altered or changed, as we have seen, by a surrender of the original, and the contract is that the bill of lading must be surrendered before the property is delivered.

This is a plain contract, which persons dealing with the consignor are justified in believing will be performed. They have also the undoubted right to rely upon the rule that no change can be made in the contract which is issued and sent out into the commercial world, as every business man knows, for the very purpose of using it as the means by which to procure money to move the produce of the country to market. If bankers cannot rely upon bills of lading as being what they plainly import, and in order to protect themselves against private oral agreements between the carrier and the shipper, varying and contradicting the bill of lading, must give notice to the carrier of rights acquired in the property as assignees, it would very seriously embarrass the business interests of the country, and would produce a state of affairs that we think is neither warranted by

sound legal principles nor by any consideration of public policy.

We think that the parol evidence should not have been admitted, and that the instructions above set out are erroneous.

Reversed.

LIVERPOOL & G. W. STEAM CO. v. PHENIX INS. CO., 129 U. S. 397, 9 Sup. Ct. 469.

(1889)

Appeal from the Circuit Court of the United States for the Eastern District of New York.

GRAY, J. This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the Montana, one of appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead bay, on the coast of Wales, before reaching her destination. In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods. * * *

In the findings of fact the Circuit Court, after stating, in much detail, the course of the ship's voyage, the conduct of her master and officers, the position and character of the various lighthouses and other safeguards which she passed, and other attendant circumstances immediately preceding the stranding, distinctly finds as facts: "Those in charge of the navigation of the Montana were negligent, in that, without having taken cross-bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a northeast by east magnetic course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out

of Holyhead bay; and in that they did not ascertain their position in Holyhead bay by means of the lights and fog-signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was." "On the foregoing facts," the only conclusion of law stated by the Circuit Court (except those affecting the right of subrogation and the amount to be recovered) is in these words: "The stranding of the Montana, and the consequent damage to her cargo, having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor." Negligence is not here stated as a conclusion of law, but assumed as a fact already found. The conclusion of law is, in effect, that, such being the fact, the respondent is liable, notwithstanding any clause in the bills of lading.

The question of negligence is fully and satisfactorily discussed in the opinion of the District Court reported in 17 Fed. Rep. 377, and in that of the Circuit Court, reported in 22 Blatchf. 372, 22 Fed. Rep. 715. It is largely, if not wholly, a question of fact, the decision of which by the circuit court cannot be reviewed here; and, so far as it can possibly be held to be or to involve a question of law, it is sufficient to say that the circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship.

The contention that the appellant is not a common carrier may also be shortly disposed of. By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only from such irresistible causes as the act of God and public enemies. Moll. De J. Mar. bk. 2, c. 2, § 2; 2 Bac. Abr. "Carrier," A; Barclay v. Cucullay Gana, 3 Doug. 389; 2 Kent, Comm. 598, 599; Story, Bailm. § 501; The Niagara, 21 How. 7, 23; The Lady Pike, 21 Wall. 1, 14. In the present case the Circuit Court has found as facts: "The Montana was an ocean steamer, built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the 'Guion Line.'

By her, and by other ships in that line, the respondent was such common carrier. On March 2, 1880, the Montana left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers." The bills of lading, annexed to the answer and to the findings of fact, show that the four shipments in question amounted to less than 130 tons, or hardly more than one-twentieth part of the whole cargo. It is clear, therefore, upon this record, that the appellant is a common carrier, and liable as such, unless exempted by some clause in the bills of lading. In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include "barratry of master or mariners," and all perils of the seas, rivers, or navigation, described more particularly in one of the bills of lading as "collision, stranding, or other peril of the seas, rivers, or navigation, of whatever nature or kind soever, and howsoever such collision, stranding, or other peril may be caused," and in the other three bills of lading described more generally as any "accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever;" and each bill of lading adds, in the following words in the one, and in equivalent words in the others, "whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howsoever." If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. Insurance Co. v. Sherwood, 14 How. 351, 364, 365; Insurance Co. v. Adams, 123 U. S. 67, 73, 8 Sup. Ct. Rep. 68; Copeland v. Insurance Co., 2 Metc. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the

bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed. Navigation Co. v. Bank, 6 How. 344; Express Co. v. Kountze, 8 Wall. 342; Transportation Co. v. Downer, 11 Wall. 129; Grill v. Screw Co., L. R. 1 C. P. 600, and L. R. 3 C. P. 476; The Xantho, L. R. 12 App. Cas. 503, 510, 515.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship. This question appears to us to be substantially determined by the judgment of this court in Railroad Co. v. Lockwood, 17 Wall. 357. That case, indeed, differed in its facts from the case at bar. It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement which it had required him to sign, and by which he was to pay certain rates for the carriage of the cattle, to pass free himself, and to take the risks of all injuries to himself or to them, was injured by the negligence of the defendant or its servants. The judgment for the plaintiff, however, was not rested upon the form of the agreement, or upon any difference between railroad corporations, and other carriers, or between carriers by land and carriers by sea, or between carriers of passengers and carriers of goods, but upon the broad ground that no public carrier is permitted by law to stipulate for an exemption from the consequences of the negligence of himself or his servants. The very question there at issue, defined at the beginning of the opinion as "whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage," was stated a little further on in more general terms as "the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence;" and a negative answer to the question thus stated was a necessary link in the logical chain of conclusions announced at the end of the opinion as constituting the ratio decidendi. 17 Wall. 359, 363, 384. The course of reason-

ing, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

By the common law of England and America before the declaration of independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English railway and canal traffic act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law. The only important modification by the congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners, (act March 3, 1851, c. 43, 9 St. 635; Rev. St. §§ 4282-4289,) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew. The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of those responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character. The fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the

highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents, and in most cases he has no alternative but to do this, or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged, unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment. It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence. This analysis of the opinion in Railroad Co. v. Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always

been the understanding of this court, expressed in several later cases. Express Co. v. Caldwell, 21 Wall. 264, 268; Railroad Co. v. Pratt, 22 Wall. 123, 134; Bank v. Express Co., 93 U. S. 174, 183; Railway Co. v. Stevens, 95 U. S. 655; Hart v. Railroad Co., 112 U. S. 331, 338, 5 Sup. Ct. Rep. 151; Insurance Co. v. Transportation Co., 117 U. S. 312, 322, 6 Sup. Ct. Rep. 750, 1176; Inman v. Railway Co., 129 U. S. 128, ante, 249.

The general doctrine is nowhere stated more explicitly than in Hart v. Railroad Co. and Insurance Co. v. Transportation Co., just cited, and there does not appear to us to be anything in the decision or opinion in either of those cases which supports the appellant's position. In the one case, a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and of protecting himself against extravagant or fanciful valuations, which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants. In the other, the decision was that, as a common carrier might lawfully obtain from a third person insurance on the goods carried against loss by the usual perils, though occasioned by negligence of the carrier's servants, a stipulation in a bill of lading that the carrier, when liable for the loss, should have the benefit of any insurance effected on the goods, was valid as between the carrier and the shipper, even when the negligence of the carrier's servants was the cause of the loss. Upholding an agreement by which the carrier receives the benefit of any insurance obtained by the shipment from a third person is quite different from permitting the carrier to compel the shipper to obtain insurance, or to stand his own insurer, against negligence on the part of the carrier.

It was argued for the appellant that the law of New York, the lex loci contractus, was settled by recent decisions of the court of appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from

all liability for his own negligence. Mynard v. Railroad Co., 71 N. Y. 180; Spinetti v. Steamship Co., 80 N. Y. 71. But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. Railroad Co. v. Lockwood, 17 Wall. 357, 368; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. Rep. 425; Carpenter v. Insurance Co., 16 Pet. 495, 511; Swift v. Tyson, Id. 1; Railroad Co. v. Bank, 102 U. S. 14; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. Rep. 10; Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. Rep. 564; Bucher v. Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. Rep. 974. The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution of the United States.

It was also argued in behalf of the appellant that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers: First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts, and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country, and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pard. Droit Com. No. 542; 4 Goujet & Meyer Dict. Droit Com. (2d Ed.) Voiturier, Nos. 1, 81; 2 Troplong Droit Civil, Nos. 894, 910, 942, and other books cited in Navigation Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 278, 285, 286; 25 Laurent Droit Civil Francais, No. 532; Mellish, L. J., in Cohen v. Railway Co., L. R. 2 Exch. Div. 253, 257. Second. The gen-

eral maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. The Lottawanna, 21 Wall. 558; The Scotland, 105 U. S. 24, 29, 33; The Belgenland, 114 U. S. 355, 369, 5 Sup. Ct. Rep. 860; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140; The Hamburg, 2 Moore, P. C. (N. S.) 289, 319, Brown & L. 253, 272; Lloyd v. Guibert, L. R. 1 Q. B. 115, 123, 124, 6 Best & S. 100, 134, 136; The Gaetano, L. R. 7 Prob. Div. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. * * *

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the railway and canal traffic act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. The Duero, L. R. 2 Adm. & Ecc. 393; Taubman v. Pacific Co., 26 Law T. (N. S.) 704; Steel v. Steamship Co., L. R. 3 App. Cas. 72; Railway Co. v. Brown, L. R. 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain. The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the declaration of independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case), as follows: "The general rule, established ex comitate et jure gentium, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where

the parties (at the time of making the contract) had a view to a different kingdom." Robinson v. Bland, 1 W. Bl. 234, 256, 258, 2 Burrows, 1077, 1078.

The recent decisions by eminent English judges, cited at the bar so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In Navigation Co. v. Shand, 3 Moore, P. C. (N. S.) 272, 290, Lord Justice Turner, delivering judgment in the privy council, reversing a decision of the supreme court of Mauritius, said: "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance. In either case, equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact, presumed de jure, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." It was accordingly held that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him thence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. Id. 278. Lord Justice Turner observed that it was a satisfaction to find that the court of cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. Julien v. Oriental Co., imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais, 225, (1864).

The case of Lloyd v. Guibert, 6 Best & S. 100, L. R. 1 Q. B. 115, decided in the queen's bench before, and in the exchequer

chamber after, the decision in the privy council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such manner as by the French law absolved them from liability. It was held that the French law governed the case, and therefore the plaintiff could not recover. It thus appears that in that case the question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the queen's bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight, or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 Best & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in Pope v. Nickerson, 3 Story, 465, as well as with later ones in the privy council, on appeal from the high court of admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. The Karnak, L. R. 2 P. C. 505, 512; The Gaetano, L. R. 7 Prob. Div. 137. See, also, The Woodland, 7 Ben. 110, 118, 14 Blatchf. 499, 503, and 104 U. S. 180.

The judgment in the exchequer chamber in Lloyd v. Guibert was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said: "It is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances in-

dicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123, 6 Best & S. 133.

It was accordingly held conformably to the judgment in Navigation Co. v. Shand, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126, 6 Best & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case; that the law of Hayti had not been mentioned or relied upon in argument; and that, "in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and, further, that the first act done towards performance was weighing anchor in a Danish port;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue. The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter-party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading (a place where both parties would

also be foreigners), partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.

In two later cases, in each of which the judgment of the queen's bench division was affirmed by the court of appeal, the law of the place where the contract was made was held to govern, notwithstanding some of the facts strongly pointed towards the application of another law,—in the one case, to the law of the ship's flag; and in the other, to the law of the port where that part of the contract was to be performed, for the non-performance of which the suit was brought. In the first case a bill of lading, issued in England, in the English language, to an English subject, by a company described therein as an English company, and in fact registered both in England and in Holland, for goods shipped at Singapore, an English port, to be carried to a port in Java, a Dutch possession, in a vessel with a Dutch name, registered in Holland, commanded by a Dutch master, and carrying the Dutch flag, in order to obtain the privilege of trading with Java, was held to be governed by the law of England, and not by that of Holland, in determining the validity and construction of a clause exempting the company from liability for negligence of master and crew; and Lords Justices Brett and Lindley both considered it immaterial whether the ship was regarded as English or Dutch. Bank v. Navigation Co., L. R. 9 Q. B. Div. 118, and L. R. 10 Q. B. Div. 521, 529, 536, 540, 544. As Lord Justice Lindley observed: "This conclusion is not at all at variance with Lloyd v. Guibert, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test, and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English; the defendant French; the lex loci contractus was Danish; the ship was French; her master was French; and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from

them. The lex loci contractus was here English, and ought to prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law." L. R. 10 Q. B. Div. 540. In the remaining English case, a contract made in London between two English mercantile houses, by which one agreed to sell to the other 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board vessels furnished by the purchasers at London, and to be paid for by them in London on arrival, was held to be an English contract, governed by English law, notwithstanding that the shipment of the goods in Algiers had been prevented by vis major, which, by the law of France in force there, excused the seller from performing the contract. Jacobs v. Credit Lyonnais, L. R. 12 Q. B. Div. 589. That result was reached by applying the general rule expressed by Denman, J., in these words: "The general rule is that where a contract is made in England between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents, are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail;" and summed up by the court of appeal, consisting of Brett, M. R., and Bowen, L. J., as follows: "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." L. R. 12 Q. B. Div. 596, 597, 600.

This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. Cox v. U. S., 6 Pet. 172; Scudder v. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. Rep. 102; Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. Rep. 857; Watts v. Camors, 115 U. S. 353, 362, 6 Sup.

Ct. Rep. 91. The opinion in Watts v. Camors, just cited, may require a word or two of explanation. It was there contested whether, in a charter-party made at New Orleans between an English owner and an American charterer of an English ship, for a voyage from New Orleans to a port of the continent of Europe, a clause regulating the amount payable in case of any breach of the contract was to be considered as liquidating the damages, or as a penalty only. Such was the question of which the court said that if it depended upon the intent of the parties, and consequently upon the law which they must be presumed to have had in view, they "must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed." The choice there was not between the American law and the English law, but between the statutes and decisions of the state of Louisiana and a rule of the maritime law common to the United States and England.

Some reliance was placed by the appellant upon the following observations of Mr. Justice Story, sitting in the circuit court: "If a contract is to be performed partly in one country and partly in another country, it admits of a double aspect, nay, it has a double operation, and is, as to the particular parts, to be interpreted distinctively; that is, according to the laws of the country where the particular parts are to be performed or executed. This would be clearly seen in the case of a bill of lading of goods deliverable in portions or parts at ports in different countries. Indeed, in cases of contracts of affreightment and shipment, it must often happen that the contract looks to different portions of it to be performed in different countries; some portions at the home port, some at the foreign port, and some at the return port." "The goods here were deliverable in Philadelphia; and what would be effectual delivery thereof, in the sense of the law (which is sometimes a nice question), would, beyond question, be settled by the law of Pennsylvania. But to what extent the owners of the schooner are liable to the shippers for a non-fulfillment of a contract of shipment of the master —whether they incur an absolute or a limited liability—must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law of Massachusetts," where the ship and her owners belonged. Pope

v. Nickerson, 3 Story, 465, 484, 485. But in that case the last point stated was the only one in judgment; and the previous remarks evidently had regard to such distinct obligations included in the contract of affreightment as are to be performed in a particular port,—for instance, what would be an effectual delivery, so as to terminate the liability of the carrier, which, in the absence of express stipulation on that subject, is ordinarily governed by law or usage of the port of discharge. Robertson v. Jackson, 2 C. B. 412; Lloyd v. Guibert, L. R. 1 Q. B. Div. 115, 126, 6 Best & S. 100, 137. * * *

This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made. The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called 'Montana,' now lying in the port of New York, and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to transship the goods

by any other steamer," would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York, in England, and adopted in 1877 at Antwerp, in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lown Av. (3d Ed.) app. Q.

The contract being made at New York, the ship owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. Navigation Co. v. Shand, Lloyd v. Guibert, and Bank v. Navigation Co., before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville & Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville & Nashville Railroad and its connections as common carriers "terminates on delivery of the property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United

States, applicable to the ocean transportation only: "Attention of shippers is called to the act of congress of 1851: 'Any person or persons shipping oil of vitriol, unslaked lime, inflammable matches, [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.'" Act March 3, 1851, c. 43, § 7, 9 St. 636; Rev. St. § 4288. It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in Navigation Co. v. Shand gives some color to the argument. 3 Moore, P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made, and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American, and not an English, contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation

by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy, and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial. This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern district of New York in The Brantford City, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the chancery division, made since this case was argued, and, so far as we are informed, not reported in the law reports, nor affirmed or considered by any of the higher courts of Great Britain. In re Steam Ship Co., 58 Law T. (N. S.) 377.

The present case does not require us to determine what effect the courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England. The question of the subrogation of the libellant to the rights of the shippers against the carrier presents no serious difficulty. From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss, and in a court of admiralty may assert in his own name that right of the shipper. The Potomac, 105 U. S. 630, 634; Insurance Co. v. Transportation Co., 117 U. S. 312, 321, 6 Sup. Ct. Rep. 750, 1176. In the present case the libellant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier. The rest of the insurance money was paid by the libellant before the argument in the District Court, and that amount might have been claimed by amendment, if not under the original libel. The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. Rep. 1172; The Gazelle, 128 U. S. 474, ante, 139.

The question of the right of the libellant to recover to the whole extent of the insurance so paid was litigated and included in the decree in the District Court, and in the Circuit Court on appeal; and no objection was made in either of those courts, or at the argument in this court, to any insufficiency of the libel in this particular.

The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in Insurance Co. v. Transportation Co., 117 U. S. 312, 6 Sup. Ct. Rep. 750, 1176, that a stipulation in a bill of lading that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier. But it behooves a carrier setting up such a defense to show clearly that the insurance on the goods is one which by the terms of his contract he is entitled to the benefit of. Inman v. Railway Co., 129 U. S. 128, ante, 249. The through bills of lading of the cotton are signed by an agent of the railroad companies and the steamship company, "severally, but not jointly," and contain, in separate columns, two entirely distinct sets of "terms and conditions," the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on, providing that in case of any loss or damage of the goods, whereby any legal liability shall be incurred, that company only shall be held answerable in whose actual custody the goods are at the time, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods," is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, plainly signifying an intention that this clause should not apply to the latter. It is quite clear, therefore, that the appellant has no right to claim

the benefit of any insurance on the goods. See Railroad Co. v. Androscoggin Mills, 22 Wall. 594, 602. The result of these considerations is that the decree of the Circuit Court is in all respects correct and must be affirmed.

NATIONAL BANK OF COMMERCE v. CHICAGO, B. & N. R. CO. 44 Minn. 224, 46 N. W. 342.

(1890)

MITCHELL, J. All of these actions grew out of the same transaction, and involve the same state of facts. They were all determined in the court below upon the same point, viz., the delivery by the defendant elevator company, as vendor, to Moak & Co., as vendees, of certain wheat, the value of which is the subject of the actions. All four appeals may therefore for convenience be considered together.

The first and main question to be considered is whether there had been such a delivery of the wheat in question by the elevator company to Moak & Co. as to pass the title absolutely to the latter. The undisputed facts are substantially these: The defendant elevator company, which appears to have been in the business of buying, selling, and shipping grain, owned and operated a grain elevator in Minneapolis. There were three tracks from the Manitoba Railroad to this elevator, designed for the use of the elevator company in its business. One of these ran through the elevator, and was on the ground of the elevator company. The other two, outside the elevator, belonged to the Manitoba Company, which acted as agent of the other railway companies, in switching all their cars to and from the elevator, for which they charged a certain sum per car. The same person, one Dudgeon, acted as the agent of all three railway companies. The two outside tracks referred to were used exclusively for the business of the elevator, unless some special emergency temporarily required some other use. The usual and invariable course of business between the elevator company and the railway companies, as to all cars loaded out of the elevator and placed on these tracks, had been for the elevator company to "card" the cars and give the railway agent the "switch bills" or "shipping orders," and without such switch-

ing orders from the elevator company the agent never removed the cars from the Manitoba tracks. This had been the course of business as to all shipments by the elevator company for Moak & Co., the former giving the railway agent a "switch bill," after Moak & Co. had paid for the grain. The elevator company had made certain executory contracts with Moak & Co. for the sale of large quantities of wheat of a specified grade. By the express terms of these contracts, the sales were to be for cash on delivery of the wheat, free on board the cars at the elevator. Large deliveries had already been made on these contracts, in all of which the terms concerning cash payment on delivery had been strictly insisted upon and enforced.

On the occasion now under consideration, Moak & Co. notified the elevator company that they desired to ship four cars of the wheat contracted for,—two by each of the railway companies, parties to these actions. Thereupon the elevator company ordered the four cars—two of each company—to be switched into its elevator, and there loaded them with wheat of the specified grade, (which was weighed and inspected by the state officers,) and then caused them to be moved by a Manitoba switch engine out from the elevator, and onto one of the tracks devoted to the use of the elevator business, and there left them standing. This loading was finished on September 14th, and on the same day the elevator company sent written notice to Moak & Co. that they had loaded the cars on their account, giving the number of each car and the weight and grade of its contents. Nothing further appears to have been done until September 17th, when the elevator company sent a bill of the wheat to Moak & Co., who gave a check for the amount on their bank, whereupon the elevator company receipted the bill, and delivered it to Moak & Co. On the same day, Moak & Co. gave shipping orders to the railway agent, and obtained from him bills of lading of the wheat, naming themselves as consignors, and certain parties in Wisconsin and Illinois as consignees, and immediately, or at least the same day, drew their drafts on the consignees, which they sold to the plaintiff bank for value, with the bills of lading attached as security. These drafts were duly presented but never paid. The elevator company never "carded" the cars or gave the railway agent any "switch bill" or "shipping orders." The judge who tried the

Bank Cases finds that Moak & Co. obtained the bills of lading from the railway companies upon presentation of the receipted bill of the wheat from the elevator company, but this is unsupported by evidence, as there is not a particle of testimony that the railway agent ever saw or knew of the existence of this receipted bill. So far as the railway companies were concerned, the first time Moak & Co. ever appeared in connection with this wheat was when they applied for and received the bills of lading. Why, or under what circumstances, the railway agent took shipping orders from Moak & Co., instead of from the elevator company, in accordance with the usual course of business, is left wholly unexplained. On the same day (September 17th) on which the elevator company received the check from Moak & Co. it deposited it with its banker. This check, according to the usual course of business, passed through the clearing-house, and on the 18th, near noon, was presented at Moak & Co.'s bank for payment, which was refused for want of funds. It appears that on the 17th, Moak & Co. had in bank sufficient funds to pay the check, but that they had drawn them out on the morning or forenoon of the 18th before the check was presented. However, no claim is made that there was any undue delay in presenting the check. On being notified of the dishonor of the check, the elevator company immediately, and on the afternoon of the 18th, caused the four cars (which still stood where they had been placed on the 14th) to be run back into the elevator, and there unloaded them, claiming the right to do so as unpaid vendor. The bank, claiming the wheat under the bills of lading, sued the railway companies for its non-delivery and recovered, whereupon the railway companies sued the elevator company for the wrongful taking of the wheat and also recovered. In the Bank Cases, which were tried together, the court found that there had been a delivery of the wheat by the elevator company, to Moak & Co., by which the title passed to the latter. In the cases against the elevator company, which were also tried together, the Court directed verdicts for the plaintiffs, upon the ground, evidently, that in his opinion that evidence showed conclusively that there had been such a delivery. But as the facts are undisputed, and in our opinion present a mere question of law, the difference in the manner in which the cases were disposed of is

unimportant. In the Bank Cases the court did not pass upon the question of the effect of the bills of lading upon the liability of the railway companies, but rested its decisions entirely upon the delivery of the wheat by the elevator company to Moak & Co.

In the briefs of counsel it is stated that the question in the cases is whether there had been a "delivery" of the wheat by the elevator company to Moak & Co. So general a statement is, we think, both inaccurate and misleading. The word "delivery" is used in different senses; and acts and facts may be sufficient to constitute a delivery for one purpose and not for another purpose. It is not every kind of delivery that will deprive a vendor of the right to retake goods for non-payment of the purchase money. Where goods are sold for cash, delivery and payment are concurrent conditions, and a delivery in expectation of immediate payment is conditional only; and if payment is not made as agreed, the vendor may reclaim the goods. Hence, the real question in these cases is whether there was an unconditional delivery of the wheat to Moak & Co.; or, otherwise expressed, did the elevator company waive the condition of cash payment on delivery, or accept the check as absolute payment? It had the undoubted right to waive this condition, also to waive payment in cash and accept the check as unconditional payment; but we fail to find anything in the facts to support any such conclusion. Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored there is no accord and satisfaction of the debt. 2 Pars. Cont. 623; Benj. Sales, 731; Brown v. Leckie, 43 Ill. 497; Woodburn v. Woodburn, 115 Ill. 427, 5 N. E. Rep. 82; Cromwell v. Lovett, 1 Hall, 56. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker,

such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods. Hodgson v. Barrett, 33 Ohio St. 63. Conceding, for the sake of argument, that there was in this case a constructive delivery of the wheat contemporaneously with the receipt of the check, there is an entire absence of evidence to rebut the presumption that it was only conditional upon the check being paid on presentation. Therefore, upon the dishonor of the check, the right of the elevator company to retake the wheat still continued in full force. Much stress is laid by counsel, and apparently by the trial court, upon the facts that the elevator company had loaded the wheat into cars of the carriers designated by Moak & Co., and had placed the cars upon the tracks of the Manitoba Company. It is urged that this amounted to a delivery of the wheat to the railway companies, who thereafter held possession as agents of Moak & Co., for transportation; that the matter of "carding" the cars and furnishing the railway agent with "switch bills" is not material upon the question of possession; that, these things being done after the cars were on the tracks, their only purpose was to furnish the Manitoba Company with vouchers for its switching charges. But it seems to us that this is putting an erroneous interpretation upon the acts of the elevator company, in view of the customary manner of doing business between it and the railway companies. Undoubtedly, in furnishing cars to be loaded, and in furnishing these tracks on which to place them after being loaded, the railway companies anticipated that the grain would be delivered for transportation ever their roads; and in loading the cars, and setting them out on the tracks specially designed for its business, the elevator company doubtless anticipated the future delivery of this wheat to Moak & Co., and its shipment on their account, and had that end in view. But until the elevator company turned the wheat over to Moak & Co., or turned it over to the railway companies for transportation on account of Moak & Co., the property was still as much in its possession as when in the elevator. All that was done merely amounted to its storing its wheat in the railway cars and on the railway tracks, designed for that purpose, preparatory to its shipment or its delivery to the vendees. Until the elevator

company turned over control of it to the railway companies for transportation, or to Moak & Co., no one but it, not even the railway companies, had any right to ship out the wheat. The business of the elevator could not be safely conducted on any other basis.

It is clearly evident that the giving of "switch bills" by the elevator company to the railway agent had a double, or perhaps treble, purpose: First, to furnish the Manitoba Company with vouchers for its switching charges; second, to furnish the agent of the railway companies with evidence of authority of the elevator company to ship the wheat; and, third, to furnish him with directions whither and to whom to ship it. It seems to us perfectly clear that, at least up to the 17th, this wheat was in the actual possession and control of the elevator company, and that if there was any delivery of any kind to Moak & Co. on that day, on the receipt of their check, it was only conditional on the check being paid on presentation; and therefore when the check was dishonored the elevator company had an undoubted right to retake or retain the wheat, whichever it may be termed. It is urged that a different rule applies where intermediately the property has been purchased by an innocent subvendee for value. The general rule is that a title, like a stream, cannot rise higher than its source, and it is difficult to see how a person can communicate a better title than he himself has, unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a subvendee, than as to the original purchaser, except perhaps that as to the former a waiver of the condition. as for example of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express but implied. See Benj. Sales, (Amer. note,) 269; Coggill v. Railway Co., 3 Gray, 545; Hirschorn v. Canney, 98 Mass. 150; Armour v. Pecker, 123 Mass. 143. It is suggested that Gen. St. 1878, c. 39, § 15, ould apply, and that any condition attached to the delivery would be void, as against creditors and purchasers, unless the contract is filed. This statute may establish such a rule as to conditional sales, properly so called, where the condition is that the title is to

pass, not upon delivery, but upon payment at some subsequent date. But it can have no application to a case like the present, where the terms of sale are cash on delivery, and the only condition attached to the delivery arises from the fact that payment by check is conditional. In such a case, if the check is dishonored, the vendor, if guilty of no fraud or laches which create an equitable estoppel against him, may retake the property even from an innocent subvendee for value. We are not called upon to decide what would have been the effect if any one had dealt with the wheat in reliance upon the acknowledgment of the elevator company, in the receipted bill, that it had been paid for, for there is no evidence that such was the fact. But it is difficult to see how any negligence or laches can be ascribed to the act of a vendor, giving his vendee a receipted bill of the goods upon receiving his check on his banker, which the vendor has every reason to suppose will be paid on presentation. See Zuchtmann v. Roberts, 109 Mass. 53. The evidence therefore did not justify the conclusion of the trial judge in the Bank Cases, that there had been a delivery of the wheat so as to pass the title absolutely to Moak & Co., and a fortiori it did not justify the direction of verdicts for the plaintiffs in the cases aganst the elevator company. Whether the evidence would have justified a finding that there was a constructive delivery at the time the check was taken and the bill receipted, it is unncessary to decide, for if there was it could only have been, as already stated, a conditional delivery, which did not deprive the elevator company of the right to retake the wheat upon the dishonor of the check. There must be a new trial at least in the cases against the elevator company.

It only remains to consider, in the Bank Cases, the effect of the bills of lading upon the liability of the railway companies to the bank, in case no wheat was in fact ever delivered to them for transportation. Of course if the wheat was delivered by the elevator company to Moak & Co., and by the latter to the railway companies for transportation, and the agent of the railway companies in good faith issued the bills of lading, the railway companies would not be liable, for it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title, as was the title of the

elevator company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently, or through mistake or negligence, issues a false bill of lading, which passes into the hands of a bona fide consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch. 330; Brown v. Coal Co., L. R. 10 C. P. 562; McLean v. Fleming, L. R. 2 H. L. Sc. 128; Cox v. Bruce, 18 Q. B. Div. 147; Meyer v. Dresser, 16 C. B. (N. S.) 646; Jessel v. Bath, L. R. 2 Exch. 267. And this has not been at all changed by the "bills of lading act," (18 & 19 Vict. c. 111, § 3.) It is also the settled doctrine of the federal courts. The Freeman v. Buckingham, 18 How. 182; The Lady Franklin, 8 Wall. 326; Pollard v. Vinton, 105 U. S. 7; Railway Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. Rep. 1132; Friedlander v. Railway Co., 130 U. S. 416, 8 Sup. Ct. Rep. 570. What was said on the subject in The Freeman v. Buckingham was probably obiter, for in that case it was sought to hold the interests of the general owner in a ship liable on a bill of lading issued by a special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of The Lady Franklin did not involve the question of a bona fide purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But, in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and apparently Ohio. Sears v. Wingate, 3 Allen, 103; Railway Co. v. Wilkens, 44 Md. 11; Fellows v. The Powell, 16 La. Ann. 316; Hunt v. Railway Co., 29 La. Ann. 446; Bank v. Laveille,

52 Mo. 380; Williams v. Railway Co., 93 N. C. 42; Dean v. King, 22 Ohio St. 118. The text-writers all agree that the overwhelming weight of authority is on this side. See 38 Amer. Dec. 410, (note to Chandler v. Sprague). The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agnecy; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. The only states that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. Armour v. Railway Co., 65 N. Y. 111; Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 12 N. E. Rep. 433; Sioux City, etc., R. Co. v. First Nat. Bank. 10 Neb. 556, 7 N. W. Rep. 311; Railroad Co. v. Larned, 103 Ill. 293; Brooke v. Railroad Co., 108 Pa. St. 529, 1 Atl.

Rep. 206. The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel in pais; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in McCord v. Telegraph Co., 39 Minn. 181, 39 N. W. Rep. 315, 318. It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was res integra we confess that it seems to us, that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property, and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents is to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial

law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise. so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake. Of course this is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.

In each of the first two cases the judgment, and in each of the last two, the order, appealed from is reversed, and in each of the four cases a new trial is directed.

Ordered accordingly.[1]

[1] Dodge v. Meyer, 61 Cal. 405.

PIERCE v. SOUTHERN PAC. CO., 120 Cal. 156.
(1898)

THE COURT:[1] The facts of this case are fully stated in the subjoined opinion of Department One. * * *

SEARLS, C.—Appeal by defendant, the Southern Pacific Company (a corporation), from a judgment in favor of plaintiff for eight thousand nine hundred and sixty-five dollars, interest and costs, and from an order denying its motion for a new trial.

The contention of defendant that it cannot be held liable for the reasons: a. That the bill of lading described the packages as "contents unknown"; b. That it was not furnished with the bill of lading or with an opportunity to inspect the property so as to inform itself of the character thereof or its liability to injury, cannot be maintained.

It is true the printed portion of the bills of lading uses the following expression: "The following articles and packages (contents unknown) marked and consigned as below, to wit." Then follows the description in each bill of lading in writing, which is in part as follows: "1 car orange trees."

Again, the evidence shows without contradiction that the cars were marked on the outside with the names and residence of the consignees, and "orange trees marked in big plain letters." In addition to this, the cars had open ventilators at each end, affording an opportunity to see and examine the contents. Defendant must, therefore, be held to have known the contents of the cars, or at least, to have had the means of knowledge at hand.

"It is the duty of the carrier to transport the goods by the usual direct route; and for any loss which a departure from such a route may occasion to them he is liable." (Hutchinson on Carriers sec. 312.)

It is said, however, that where there are two or more customary routes, and the carrier is left free to choose between them, he may take his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe. (U. S. Express Co. v. Kountz, 8 Wall. 342; Maghee v. Camden, etc., R. R. Co., 45 N. Y. 514; 6 Am. Rep. 124).

[1] Abridged.

Judging from the testimony, it can hardly be said that the route by which defendant shipped the goods in this case was one of its customary routes. With a through route of its own through Texas, New Mexico, and Arizona, it sent the goods many hundred miles to the north over roads operated by other companies, to meet its Central Pacific road at Ogden, in the State of Utah.

Conceding, however, that the route was a usual one, there were special reasons for not sending goods which were liable to destruction by frost over this northern route in winter, where defendant might reasonably have expected the result which followed.

When, therefore, defendant's through route via Fort Yuma was obstructed by stress of weather, it became its duty to hold the goods until that or some other safe avenue was opened, or to notify the consignees or consignors and take their directions in the premises. The evidence shows that they did this with another car of like orange trees at a date a little earlier, and by direction of the consignees shipped them safely through by the Atlantic and Pacific R. R. Where goods are marked in such a way as to indicate their character, or as to give notice to the carrier that their safety requires that they must be carried in a particular manner, such marks must not be disregarded. (Hutchinson on Carriers, sec. 310.)

In view of all the surrounding circumstances, we are of opinion that the defendant, by a failure to adopt one or the other of the foregoing courses, erred in judgment and became liable to plaintiff for the results which followed. The evidence fails to establish a case of gross or wanton negligence, but still does, we think show a want of that extraordinary care imposed upon common carriers of goods.

A carrier is not relieved from responsibility under a contract that he shall not be responsible if he has been guilty of negligence. Railroad Co. v. Pratt, 22 Wall. 123.

It is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants. (Hutchinson on Carriers, sec. 260, and cases there cited. Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool, etc., S. S. Co. v. Phenix Ins. Co., 129 U. S. 397.)

As to the measure of damages. The court below awarded damages up to the full value of the goods at the point of destination, although the uncontradicted evidence tended to show that the value at the shipping point was about one-half of that given. It will be observed that the contract between the plaintiff and the Florida Midland Railway was for a through shipment of the goods to Riverside. We repeat that portion essential to the matter in hand: Whereas, said railway company has agreed that the cost of transportation shall not exceed $1.97¾ per 100 lbs., said rates being lower than the regular tariff charges of said railway company and connections;

Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Midland Railway Company and all lines over which said shipments may pass between points of shipment and destination. * * * It is further agreed that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable.

There is a wide distinction between a contract for exemption from liability in case of negligence which is usually held in derogation of public policy because tending to encourage negligence. and a contract fairly made whereby in consideration of a lower freightage the parties agree upon a fixed or determinate value to be placed upon the article to be shipped in case of its loss.

Hutchinson, at section 250. after discussing the question of total exemption in case of negligence, adds: "To be distinguished from these cases, however—though the distinction is not always observed—are those cases, obviously different, in which for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon." When such is the case, the Supreme Court of the United States and many of the state courts hold, to use the language of Mr. Justice Blatchford, in Hart v. Pennsylvania R. R. Co., 112 U. S. 331: "That where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper

and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation."

In the same case the learned justice further said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of contract of transortation between the parties to that contract. * * * There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles or fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and repudiate it in case of loss."

We understand full well that there are many cases holding a contrary doctrine to that enunciated in Hart v. Railroad, supra, but we think that case which is cited as a leading one is founded upon the reason and justice, and that the trend of judicial opinion is to the doctrine there enunciated. (See cases cited in Hart v. Pennsylvania R. R. Co., 112 U. S. 342.)

Respondent objects, and urges that as the trees in question were cultivated by the plaintiff there was not and could not be any "invoice price."

The evident answer is that by the term "invoice price" was meant the cost or value of the property at the shipping point. That it had a fixed value at that point was attested by the evidence. One of the definitions of an invoice is: "A writing made on behalf of an importer, specifying the merchandise imported, and its cost or value." (Black's Law Dictionary.)

Plaintiff sued upon his special contract and averred that the defendant received the goods thereunder.

Defendant averred in its answer "that it duly performed its duty under the contract set out in the complaint."

We think the demand for damages from the defendant was in due time and sufficiently specific, in the absence of any demand

by defendant of an invoice, to comply with the contract.

We think the court erred in overruling the objection of the defendant to proof of the market value of the trees at Riverside instead of confining the inquiry to the cost or value of the trees at the point of shipment in Florida as per contract, which with the freight paid was the true measure of damages.

For this error we recommend that the judgment and order appealed from be reversed and a new trial ordered. * * *

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and a new trial ordered.[1]

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c. Reasonable Compensation.

NICHOLLS & MORE, 1 Sid. 36.

(1661)

The defendant being a water carrier between Hull and London, the plaintiff delivers goods to him at York to carry them from Hull to London, and the goods being lost the plaintiff brings action upon the case and found for him, and it was moved in arrest of judgment (1) that he did not agree with the carrier to carry them for a sum certain; (2) the agreement was made for their carriage between Hull and London and the defendant had not taken upon himself to convey them from York to Hull.

But this notwithstanding, by THE WHOLE COURT.—The defendant shall be charged upon his general receipt at York in accordance with Southcote's Case [4 Coke, 84], though he says nothing about carrying them to Hull. And as to the other matter, that they have not agreed for a sum certain for carriage between Hull and London it was said by the court that it is not necessary, for the carrier may declare upon a quantum meruit like a tailor, etc. And therefore he shall be held liable, and judgment for the plaintiff.

[1] Limitation of liability when carrier knows valuation is false.—21 Harv. L. Rev. 39-46.
Agreed valuation.—21 Harv. L. Rev. 32-46.
Contract against liability for negligence.—20 Harv. L. Rev. 23-24, 306-312.
22 Harv. L. Rev. 59.

CURLING v. LONG, 1 Bos. & P. 634.

(1797)

Assumpsit for freight claimed under the following circumstances. The plaintiffs were owners of the ship "The Earl of Effingham," and the defendants the consignees of nine hogsheads of sugar shipped on board her while lying in Salt River, Jamaica, and bound for London. The goods were put on board on the 18th of September, 1795, and four several bills of lading were duly signed by the captain. On the 2d of December following, having completed her lading, the ship cleared out for her voyage. On the 31st of December, while waiting for convoy, she was cut out of the river by two French privateers, and carried out to sea, but was recaptured on the same day by a British schooner, and carried into Port Royal. The ship was afterwards libeled in the Admiralty Court of Jamaica, and appraised and sold under an order of that court. The proceeds of the sale, after deducting one-eighth for salvage, were remitted to the defendants as agents for the several owners of goods on board. The whole of the cargo, including the goods in question, was brought to the ship in Salt River for the purpose of being loaded, and was actually put on board at the expense of the plaintiffs as owners of the ship according to the usage of the Jamaica trade. This amounted to £310. The plaintiffs also expended £455 18*s*., according to the same usage, for the provisions and wages of the crew, between the time when the ship began to take in her loading, and the time of the capture. The plaintiffs' demand was shaped in different ways so as to recover a proportion of the freight either from the 1st of September, 1795, when the goods were put on board, to the 1st of January, 1796, when the ship was recaptured, or from the 2d of December, 1795, the day the goods were shipped, to the 1st of January, 1796, the day she was recaptured; or to recover a proportion of the sums expended by the plaintiffs as above mentioned.

The cause was tried before EYRE, Ch. J., at the Guildhall sittings, after Michaelmas Term, 1796, who directed a nonsuit.

A rule nisi for setting aside this nonsuit and entering a verdict for the plaintiffs having been obtained on a former day [etc.].

EYRE, Ch. J. This is a case of the very first impression; and it appears to me that the demand of the plaintiffs is neither war-

ranted by the marine or by the common law. The former has settled what freight is, what services it includes, and also that it is divisible, which is contrary to the principles of the common law. At common law all the expenses of loading are included in the freight, and if the party be not entitled to freight he can demand no satisfaction for loading. The inception of freight is breaking ground. In the law of insurance, indeed, this doctrine is not holden so strict, for there, if the goods be so situated as to create a well-grounded expectation of freight being raised, it is decided that the freight is insurable and recoverable. But that does not affect the marine law as to freight in cases between the shipowners and freighters, by which the case must be decided. According to that law no right to freight commences till the ship has broken ground; here the ship had not broken ground, having been captured in the river. The situation of the places where cargoes are taken in materially varies the labor, cost, and pains taken by the shipper and master. In some places there is little difficulty and expense, in others a great deal. On these circumstances depends the price of freight: if the master incurs this cost and trouble, he takes a larger freight; if the shipper, a smaller. In either case the freight is his reward. If, therefore, by the marine law he be entitled to no freight, he can claim no remuneration. So stands the case by the marine law. Let us now view it upon the principles of the common law. The contract was to load these goods on board and bring them to England for a certain price. Upon this contract, how could a declaration be framed for the plaintiff's demand either in assumpsit, or an action on a charter party? Could the plaintiffs state a part performance of the contract and insist on payment for it? This could not be done, for by the law of England the contract is entire and indivisible. By the marine law, indeed, parties may recover pro rata, if the voyage be interrupted. And by the common law, where a contract cannot be performed, such a meritorious consideration may arise as will sometimes entitle a party to recover in the form of an action of assumpsit for work and labor even after the contract has been broken. Such is the case where a ship after capture and recapture completes her voyage: for there the shipper has his goods with the advantage of carriage; and upon that, though the original contract be gone, a meritorious consideration arises which entitles the master to a recompense;

not, however, on the foot of the old contract, but on a new contract which springs out of it. Here the ship never arrived at the port of destination, but put into a port in Jamaica, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the smallest degree by the expenses incurred. I am therefore of opinion, that neither by the marine or the common law are these plaintiffs, however unfortunate, entitled to recover.

HEATH, J. This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consumated upon her arrival at the port of destination. If the voyage be interrupted the party may claim pro rata. Freight commences at the same time in all parts, since it depends on the same principles here and at Jamaica. It is true, indeed, that by the customs of different ports, duties more or less onerous may be imposed on the master, and recompensed by the freight. But that does not vary the principle. This case is only new in its circumstances. The law of insurance does not apply to this case; for the mere hope or expectation of interest is sufficient to entitle the assured in a policy of insurance to recover against the underwriters.

ROOKE, J. This is a new case, and therefore I take the demand not to be founded on the usage of trade. The contract in a bill of lading is for freight. The expression is, "they paying freight;" and though the master may have been at the expense of loading, and the freight was higher on that account, yet as it had not commenced, the plaintiffs cannot demand a recompense. The textwriters all agree that freight commences from the breaking ground. This is clear and intelligible: the ship begins to earn when she begins to move; and we cannot introduce new principles. The writers also say, that there may be cases where the shipowners may be entitled to a proportion of what the ship has earned; but that cannot include what has been earned by the master before the commencement of the voyage. This doctrine is founded in good policy, for it tends to expedite the sailing of the ship. Did the freight commence sooner, it might induce the master to stay a longer time in port and so delay the voyage. Insurance is a contract of indemnity; the cases,

therefore, which are founded on such a contract are not applicable to this case. Upon these grounds I think the nonsuit right.

Rule discharged.

SAYWARD v. STEVENS, 3 Gray (Mass.) 97.

(1854)

Assumpsit to recover a balance due for freight of an invoice of lumber from Boston to San Francisco. * * *

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions. * * *

BIGELOW, J. The more important question in the case arises upon the true construction of the contract of shipment, as it is expressed in the bill of lading. The general rule is, that all contracts for the conveyance and delivery of merchandise for an agreed price are in their nature entire and indivisible; and unless completely performed by the carrier, he is not entitled to any such compensation. The undertaking is not only to carry the goods to a particular destination, but it also includes the duty of delivering them in safety; and no freight is earned until the contract for delivery, as well as of carriage, is completely fulfilled. Chit. Con. (8th Amer. ed.), 636; Angell on Carriers, § 397.

There are exceptions to this general rule, founded on principles of justice and equity, arising out of particular circumstances; but the rule itself is elementary, and lies at the foundation of this species of contract. Indeed, the definition of a bill of lading, as given by high authority, is, that it is the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. Its peculiarity is, that unless freight is wholly earned by a strict performance of the voyage, no freight is due or recoverable. The contract of the carrier is indivisible, and he can recover for no portion of the voyage that has been made, until the whole is finished and the goods have reached their destination. Mason v. Lickbarrow, 1 H. Bl. 359; Angell on Carriers, § 398. The operation of this rule is sometimes hard and inequitable. For this reason, courts of law have, in many cases, readily seized upon any features in contracts for transportation from which it could be fairly inferred that the parties intended to make them divisible and apportionable; while in other cases they have given such interpretation to the acts of parties

as to substitute, in the place of the original entire contract, a new agreement, by which the shipper became bound to pay a proportional freight, although the carrier had not fulfilled the whole of the original contract on his part. Within the former class of cases are comprehended all contracts of affreightment by charter-party or bills of lading, where the freight is payable by the ton, by admeasurement, by the package or barrel, or where different portions of the same cargo are shipped upon distinct and separate terms as to freight. In all such cases, it is held that the delivery of the cargo is in its nature divisible, and the contract itself furnishes the means and the measure of apportioning the freight according to the quantity of the cargo actually delivered. Abbott on Shipping, 266; Ritchie v. Atkinson, 10 East, 295. Within the latter class are included all cases where the shipper or consignee, by a voluntary acceptance of his goods at an intermediate port, or by a receipt of a portion of an entire shipment at the place of destination, is held to have waived the full performance of the original contract, and to be liable pro rata for the carriage of the goods actually received by him. Abbott on Shipping, 406; Ship "Nathaniel Hooper," 3 Sumner, 550, 551.

Upon examination of the contract in the present case, it seems to us very clear that the contract is an entire one, and does not fall within any of the cases which authorize an apportionment of the freight. It is an agreement to transport a certain number of articles from Boston to San Francisco for an entire, aggregate sum as freight. On the part of the owners of the vessel, it is an agreement to carry and deliver all the articles enumerated in the bill of lading, for which the shipper agrees to pay and they agree to receive a sum in gross. The agreement to carry and deliver goes to the whole consideration to be paid therefor. They are mutual agreements, but that of the owners of the vessel is precedent to that of the shipper. The entire carriage and delivery were to be performed before any title to the freight-money accrued to the owners. Such is the legal construction of the usual contract for the carriage of goods. That it is the necessary interpretation of the contract of the parties in the present case results not only from the entirety of the consideration, but also from the nature of the merchandise comprised in the shipment. If it had been a contract for the tarnsportation of a cargo

of similar and homogeneous articles, for an entire sum in gross, it might have been urged with some plausibility that the parties contemplated an apportionment of freight, in case of disaster or other cause, by reason of which a portion of the cargo might fail to reach its place of destination. If, for instance, a hundred barrels of flour were shipped under a bill of lading, by which it was stipulated that the freight to be paid therefor should be five hundred dollars; in such case, the delivery of an aliquot part thereof at the place of destination, forming a certain specific and definite proportion of the entire invoice, would furnish the basis of an acurate division and apportionment of the entire freight-money, according to the amount actually carried and delivered. But, in the case at bar, the shipment is made up of a variety of miscellaneous and diverse articles, unlike in kind, quality, and value, incapable of being packed and stowed together, and bearing no definite proportion to each other in size or in cost of transportation. Having reference, therefore, to the nature of the shipment, as well as to the consideration agreed to be paid for the carriage of the articles, it is manifest that the contract affords no basis by which to divide the invoice and apportion the freight. It is an entire invoice, to be carried for an entire sum, incapable of apportionment; and where, from the nature of the contract and its subject-matter, it is fair to infer that the parties intended to make their contract one and indivisible.

It follows as a necessary consequence, that the owners of the vessel, if they failed to transport and deliver the whole of the articles included in the bill of lading, by reason of the neglect of the master, are not entitled to recover the balance claimed by them for freight, unless they can show an acceptance, by the shipper or consignee at San Francisco, of that portion of the shipment which arrived there in safety, and thus bring themselves within the second class of exceptions above stated to the general rule governing entire contracts for the conveyance of merchandise. The case finds that on the arrival of the vessel at its port of discharge no one appeared to receive or claim the goods. The consignee, owing, probably, to the state of the market in San Francisco, by which the merchandise was rendered of less value there than the sum agreed to be paid for the freight, failed to receive it. In the absence of an express stipulation in the bill of lading to meet such a contingency, it might have been

the duty of the master, having in his charge an invoice of goods not perishable in their nature, to store them for the benefit of the shippers. It is doubtful whether he would have had the right to sell them. Abbott on Shipping (5th Amer. ed.), 378, note; Schooner Cassius, 2 Story, R 81. However this may be, in the present case there was an agreement in the bill of lading by which it was stipulated that the articles, if not received by the consignee, on the day after their arrival, might be sold by the master. There was therefore no receipt of the goods by the regular consignee, from which an acceptance of them can be inferred to charge him or the shipper a pro rata freight thereon. It is contended, however, by the plaintiffs, that this clause in the bill of lading, giving the master, by reason of their non-acceptance, a right to sell, and a sale by him in pursuance of it, are equivalent to a receipt of the articles by the consignee; that it substituted the master in his place, and conferred on him the same rights and powers to bind the shipper as his agent, and render him liable for the freight of the goods sold in like manner as the consignee would have been, if he had taken the goods on their arrival. But it appears to us that this agreement is based on too broad a construction of this clause in the bill of lading. The original intent of the parties in the insertion of this provision for a sale of the goods, was to give the master the right to realize his freight-money by a sale of the goods, if they were not received and the money paid within the time specified in the bill of lading. If this was the object of the clause, then, there having been no freight earned, in consequence of the failure to carry the whole shipment, there was no right on the part of the master to sell. He exceeded his authority in making the sale, and the owners cannot bind the shipper by an unauthorized act of their master, But giving to this stipulation the most liberal construction which in any view it is capable of, it made the master the agent of both parties to sell the goods for the benefit of whom it might concern, and to hold the proceeds for those who should be legally entitled to receive them. It created a special and limited agency only, by which the master had the right to convert the merchandise into money, but not thereby to change the right of property in the proceeds, or to waive the legal rights of the parties under their contract.

We are therefore of opinion that the contract of affreightment in the present case was an entire one, by which the plaintiffs undertook the carriage and delivery of the goods specified in the bill of lading; and a portion of them having been lost through the fault of the master, and there being no proof of an acceptance of that portion which arrived in safety by the shipper or any authorized agent in his behalf, that the plaintiffs are not entitled to recover the balance of freight claimed to be due by them.

Exceptions overruled.

MILLER v. MANSFIELD, 112 Mass. 260.

(1873)

Tort for conversion of 100 barrels of flour. Defendant was an agent of the Housatonic Railroad Company, over whose line the flour had been shipped to plaintiff. Plaintiff allowed the flour to remain on the car for five days after notice of its arrival, and defendant then refused to permit him to remove it, though tendered the freight, unless he also paid a charge of $2 a day for delay in unloading beyond 24 hours. The court instructed the jury that there was no lien for the charge for delay in unloading, and plaintiff had a verdict. Exceptions.

MORTON, J. For the purposes of this hearing, all the facts which the defendant offered to show are to be taken as established. We must assume, therefore, that there was an existing regulation and usage of the Housatonic Railroad Company that car loads of freight like that of the plaintiff's should be unloaded by the consignee within 24 hours after notice to him of their arrival, that for delay in unloading, after 24 hours, the consignee should pay $2 a day for each car belonging to other railroad companies, and that this regulation and usage was known to the plaintiff.

Being known to the plaintiff, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted in reference to it. It enters into and forms part of their contract, and the railroad company is entitled to recover the amount fixed by the usage, by virtue of the plaintiff's promise to pay it. This charge is, in its essential character, a charge for storage. After the arrival of the goods at their destination the liability of the company as common carriers ceased, but they became liable for the custody of the goods as warehousemen, and, if they were not

removed within a reasonable time, were entitled to compensation, for which they had a lien as warehousemen. Norway Plains Co. v Boston & Maine Railroad, 1 Gray, 263, 61 Am. Dec. 423. The parties, by their agreement, fixed the rate of compensation which the company should receive and the time when it should commence. It is not material that the goods remained in the cars instead of being put into a storehouse. The responsibility of the company for their custody was the same as if they had been stored, and they had the right to retain them until their charges were paid.

Both parties have assumed that the question involved in the case is the same as if the suit had been directly against the railroad company, and we have, therefore, so treated it.

Exceptions sustained.[1]

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d. Lien.

SKINNER v. UPSHAW, 2 Ld. Raym. 752.

(1702)

The plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, etc. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, etc., and therefore he retained them. And it was ruled by HOLT, Chief Justice at Guildhall (the case being tried before him there), May 12, 1 Ann. Reg. 1702, that a carrier may retain the goods for his hire; and upon direction the defendant had a verdict given for him.

ROBINSON v. BAKER, 5 Cush. (Mass.) 137.

(1849)

This was an action of replevin, for six hundred barrels of flour, tried before Dewey, J., and reported by him for the con-

[1] Miller v. Ga. R. Co., 88 Ga. 563, (1891); Norfolk & W. R. Co. v. Adams, 90 Va. 393, (1894); Gulf City Co. v. Louisville & N. R. Co., 121 Ala. 621, (1899); Darlington v. Mo. Pac. Ry. Co., 99 Mo. App. 1, (1902); Schumacher v C. & N. Ry. Co., 207 Ill. 199, (1904); 22 L. R. A. 530, note; 36 L. R. A. 850.

It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of York v. Grenaugh, 2 Ld. Ray. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, lord chief justice Holt cited the case of an Exeter common-carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them, and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of King v. Richards, 6 Whart. 418, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in York v. Grenaugh of the Exeter carrier. In 1843, there was a direct adjudication, upon the question now under consideration, in the Supreme Court of Michigan, in the case of Fitch v. Newberry, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier, however, was wholly ignorant of that, and supposed they were rightfully delivered to him; and

he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle settled was, that if a common-carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods or trover for their value. The case appears to have been very fully considered and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of Buskirk v. Purin, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendant insisted on his right of lien for freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of Saltus v. Everett, 20 Wend. 267, 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor." There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent.

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and

distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of caveat emptor apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of King v. Richards, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common-carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied, that upon the adjudged cases, as well as on the general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner,

express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.[1]

POTTS v. NEW YORK, ETC., R. R. CO., 131 Mass. 455.

(1881)

Tort for the conversion of a quantity of coal. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon an agreed statement of facts in substance as follows:

The plaintiff, a coal merchant, sold to a firm in Southbridge in this Commonwealth a large quantity of coal and shipped 205 tons thereof by a schooner to Norwich, Connecticut, to be thence transported by the defendant over its railroad to the consignees at Southbridge. The defendant received the coal at Norwich, paying the water freight to discharge the schooner's lien, amounting to $205, and then carried the coal to Southbridge and delivered to the consignees all but 119 tons thereof, no part of the advances for water freight nor the defendant's freight being paid. On the arrival at Southbridge of the 119 tons, which is the coal in controversy, the consignees having failed, the plaintiff duly stopped it in transitu, and demanded it of the defendant. The defendant refused to deliver it, claiming a lien on it for the entire amount of the water freight on the whole cargo paid by the defendant, and for the whole of the defendant's freight on the cargo, amounting in all to $513. The plaintiff tendered to the defendant $297, which was enough to cover the water freight and the defendant's freight on the coal in question. The value of the coal in controversy was $696.

If the defendant had no right to hold the coal as against the plaintiff for the advances and freight on the whole cargo, judgment was to be entered for the plaintiff for $398, with interest from the date of the writ; otherwise, judgment for the defendant.

GRAY, C. J. A carrier of goods consigned to one under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the

[1] Vaughn v. Providence, 13 R. I. 578; Wells v. Thomas, 27 Mo. 17; 23 Harv. L. Rev. 63.

rest without proof of an intention so to do. Sodergren v. Flight, cited in 6 East, 622. Abbott on Shipping (7th ed.) 377. Lane v. Old Colony Railroad, 14 Gray, 143. New Haven & Northampton Co. v. Campbell. 128 Mass. 104. And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. Briggs v. Boston & Lowell Railroad, 6 Allen, 246, 250.

The right of stoppage in transitu is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. Bloxam v. Sanders, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406. Rowley v. Bigelow, 12 Pick. 307, 313. This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. Oppenheim v. Russell, 3 B. & P. 42. Jackson v. Nichol, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591. See also Butler v. Woolcott, 2 N. R. 64; Sears v. Wills, 4 Allen, 212, 216. But the common law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against consignee.

Judgment for the defendant.

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4. Termination of Relation.

HYDE v. NAVIGATION CO., 5 T. R. 389.

(1793)

This was an action on the case against the defendants as common carriers. * * *

It appeard at the trial that the goods (cotton) were put on board the defendant's barges at the respective places mentioned in the declaration, and conveyed therein along the defendant's navigation and the Duke of Bridgewater's canal to Manchester,

where they were landed upon the quay, and lodged there in the Duke of Bridgewater's warehouse, in which place they were consumed by an accidental fire the same night. In the bills made out by the defendants, there were charges of so much for tonnage on the river Trent, so much for tonnage on the Trent and Mersey Navigation, so much for the Duke of Bridgewater's canal, so much for warehouse room for the Duke of Bridgewater; besides which, in the bill for the fourteen bags was a charge for cartage, which was intended for the cartage from the Duke of Bridgewater's warehouse to the plaintiff's own warehouse in Manchester, and which was paid by the plaintiffs when the goods were put on board the defendant's barges. * * * A verdict was found for the plaintiffs at the sittings after last term at Guildhall before LORD KENYON; to set aside which a rule having been obtained.

LORD KENYON, Ch. J. This is a question of very general concern, since few days in the year occur in which cases do not arise that may depend upon it; and therefore it were to be wished that this case should have called for a decision upon the point, which should have left no doubt in future respecting the extent to which common carriers are liable. But peculiar circumstances exist in this case, which render it unnecessary to decide the general question; though as the whole has been argued at the bar, I will give my opinion on the general, as well as the particular, question made. I lay no stress on the circumstances so much relied on, that the defendants named themselves on their card, "carriers by land and navigation;" that was introduced in order to advertise the public that they would carry the whole distance from London to the most extreme point, including, in several places, intervals by land between one navigable cut and another; this, therefore, could have no reference to the article of carriage from the navigation at Manchester to the plaintiffs' warehouse. On the point of law, the rule is too clear to admit of any doubt; the only question is respecting the application of the facts in this case to it. Whether at the time when the accident happened the goods were in the custody of the defendants as common carriers? because if they were, by the strict rules of the law the defendants are responsible, carriers being insurers in all cases except in two. That the plaintiffs' goods were in the custody of the defendants as

carriers, when they were navigated on their own canal, there is no doubt; it is equally clear that they were so during the time when they were on the Duke of Bridgewater's canal, which is open to the public, they paying the Duke tonnage on it; it is as clear that when the goods arrived at Manchester, they were unloaded with due care and circumspection, and deposited in the Duke of Bridgewater's warehouse; after this a further act was to be done, the goods were to have been taken away in carts, but not by the defendants, for, though they formerly kept carts and carried away the goods of their customers to their respective houses, for some time past they have ceased to have any concern with the carts, or to derive any advantage from cartage whatever; the carts themselves and all the benefits arising from that part of the business belonging to Hibbert. If indeed there had been any fraud in this transaction, as if the defendants had induced the public to believe that they would be responsible in all cases, and, in order to excuse themselves, had relied on some secret agreement between them and Hibbert, that might have varied the case; but in the first place we cannot presume fraud, and in the next, there are no facts in the case from which we could presume it. If the defendants here be liable, consider how far the liability of carriers will be extended: it will affect the owners of ships bringing goods from foreign countries to merchants in London; are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange, indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England after having landed them at their usual wharf. The instance of game, which has been mentioned at the bar, shows the general sense and understanding of the public on this subject. The different claims of the respective persons concerned are separately marked on the direction. The carrier who receives a certain sum for carrying the game, is not bound, in consideration of that sum, to deliver the goods; he has performed his duty when he has brought the game to the inn where he puts up: then the business of the porter begins. I am not aware that it has ever been decided that it is the duty of the carrier to deliver such goods at the house of every individual person

to whom they are directed; if it has, the action brought by Mr. Price against the keeper of the Bell Inn was misconceived; it should have been brought against the carrier, and not the innkeeper; and yet it did not occur to the defendants' counsel, in that case, to make such an objection. When goods are sent by a coach, a letter of advice should also be sent to the person to whom they are directed that he may send for them: or the price which the porter expects to receive for delivering them will induce such porter to carry them; but the carriage and porterage constitute distinct charges.

In this case, however, there is one peculiar circumstance, which makes it unnecessary to decide the general question, and that is the charge made by the defendants in one of their bills for the cartage at Manchester; for that charge the defendants undertook to deliver the goods. Therefore, without deciding the general question, I think the plaintiffs are entitled to the verdict which they have obtained. On the general point, I have great doubts; the leaning of my mind at present is, that carriers are not liable to the extent contended for.

ASHHURST, J. I am glad to find one circumstance which puts the case out of all doubt; namely, that one of the bills contains a charge for the wharfage and cartage; which is decisive to show that in this case the liability of the defendants continued until the goods were delivered. Had it not been for this circumstance, I should have desired further time to consider the case. The inclination of my opinion on the general question is, that a carrier is bound to deliver the goods to the person to whom they are directed. A contrary decision would be highly inconvenient, and would open the door to fraud; for if the liability of a carrier were to cease when he had brought the goods to any inn where he might choose to put up his coach, and a parcel containing plate or jewels, brought by him, were lost before it was delivered to the owner, the latter would only have a remedy against a common porter. It has been said, however, that it is the practice of many persons to send to the inn for their goods: but that does not prove that the carrier is not bound to deliver them, if they do not send. If the owner choose to send for his goods, that merely discharges the carrier from his liability in that case; it only dispenses with the general obligation thrown by the law upon the carrier; but it

does not apply to the other cases where that obligation is not dispensed with. But on this question I do not mean to give any decided opinion.

Rule discharged.

DE MOTT ET AL. v. LARAWAY, 14 Wend. (N. Y.) 225.

(1835)

Laraway sued De Mott & Ingersoll in a justice's court to recover freight due to him as a common carrier. It was conceded that the amount was $39; but the defendants interposed as a defence the neglect of the plaintiff to deliver a hogshead of molasses, which he had received for transportation. Laraway was the owner and master of a canal boat, and received on board his boat at Troy, a hogshead of molasses and other goods belonging to the defendants to be transported to Kidder's Ferry, being a landing place nearest to Farmersville, where the defendants transacted business. All the goods were safely transported and delivered to the defendants, except the hogshead of molasses. The boat arrived at Kidder's Ferry, and in the attempt to hoist the hogshead of molasses into a warehouse, the usual place for the delivery of goods for Farmersville, the fall (part of the machinery for hoisting attached to the warehouse) broke, and the hogshead fell back into the boat, was stove, and most of the molasses was lost. At the time of the accident, the hogshead was clear of the boat, and almost up to the sill of the door of the warehouse. One of the defendants was present, and had wagons there in which some of the goods were loaded. The value of the molasses was proved. The justice gave judgment in favor of the defendants for $12.87. The plaintiff sued out a certiorari, and the Common Pleas of Seneca reversed the justice's judgment. Whereupon the defendants sued out a writ of error.

By the Court. SUTHERLAND, J. The court of common pleas erred in reversing the judgment of the justice. Laraway was a common carrier upon the canal, and as such undertook to transport the defendant's goods from Troy to Kidder's Ferry. This necessarily included the duty of delivering the goods there in safety. They were all thus delivered except a hogshead of

molasses, which was stove, in the act of being unladen; as they were hoisting it from the boat, with a tackle attached to a storehouse upon the bank of the canal, the rope broke, and the hogshead fell into the boat, and most of the molasses was lost. Although one of the defendants was present, there is no pretence that he had accepted the molasses as delivered, previously to the accident, or that he had anything to do with the delivery. The delivery was not complete when the accident occurred, and the goods were still at the risk of the carrier. It is a matter of no importance that the machinery employed in unlading the boat was attached to and belonged to a store on the bank of the canal, and not to the carrier's boat. It was pro hac vice his tackle, and he was responsible for its sufficiency. When the responsibility of a common carrier has begun, it continues until there has been a due delivery by him. 4 Kent's Comm. 604; 4 T. R. 581: 5 id. 389. * * *

Judgment reversed.

NORWAY PLAINS CO. v. BOSTON & MAINE R. R., 67 Mass. (1 Gray) 263.

(1854)

Action of contract upon the agreement of the defendants to transport certain goods from Rochester (N. H.) to Boston.

SHAW, C. J. The liability of carriers of goods by railroads, the grounds and precise extent and limit of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees, and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common

law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent and forms a rule of law for future cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen, and practices actually grown up, are rendered, in a good degree precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or a new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstance. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and

railroads are but of yesterday yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston, in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester, (N. H.,) the one October 31st, 1850, and the other November 2nd, 1850.

By the facts agreed it appears, that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday, the 2nd of November, and were then taken from the cars, and placed in the depot or warehouse of the defendants; that no special notice of their arrival was given to the plaintiffs or their agent; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods: that they were ready for delivery at least as early as Monday morning, the 4th of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November; the cars arrived late; Ames the truckman knew from inspection of the waybill that the goods were on the train, and waited for them some time, but could not conveniently receive them that afternoon, in season to deliver them at the places to which they were directed, and for that reason did not take them; in the course of the afternoon they were taken from the cars and placed on the platform within the depot; at the usual time at that season of the year, the doors were closed. In the course of the night the depot accidentally took fire, and was burnt down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care, on the part of the railroad corporation, or their agents or servants.

We understand the merchandise depot to be a warehouse suitably inclosed and secured against the weather, thieves, and

other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses, used for the storing of merchandise; that it is furnished with tracks, on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track, on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot there to remain a reasonable and convenient time, without additional charge until called for by parties entitled to receive them.

The question is whether, under these circumstances, the defendants are liable.

That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is, to ascertain the precise limits of their liability. This was done to a certain extent in this court, in a recent case, with which, as far as it goes, we are entirely satisfied. Thomas v. Boston & Providence Railroad, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods, during the transit, except those arising from the act of God or a public enemy. It is not necessary now to inquire into the weight of those considerations of reason and policy, on which the rule is founded; nor to consider what casualty may be held to result from an act of God, or a public enemy; because the present case does not turn on any such distinction. It is sufficient, therefore, to state and affirm the general rule. In the present case the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of the

company, though the goods remained in their custody. If, at the time of the loss, they were liable as common carriers, they must abide by the loss; because as common carriers they were bound as insurers to take the risk of fire, not caused by the act of God, and in such case, no question of default or negligence can arise. Proof that it was from a cause for which they, neither by themselves nor their servants, were in any degree chargeable, could amount to no defense, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by an accidental fire, not caused by the default or negligence of themselves, or of servants, agents, or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place at its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J. in Hyde v. Trent & Mersey Navigation, 5 T. R. 387: "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of rails, on which it moves; a

freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course, it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all goods carried on it, to whomsoever they may belong or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodations by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of opinion, that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver theme to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or, if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties, when not modified or altered by special agreement, the effect and operation of which may not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers for

hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; is necessary, it may be said that delivery or, in analogy to the old rule, that delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence. Indeed the same doctrine is distinctly laid down in Thomas v. Boston & Providence Railroad, 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of Garside v. Trent & Mersey Navigation, 4 T. R. 581, and Hyde v. Trent & Mersey Navigation, 5 T. R. 389. See also Van Santvoord v. St. John, 6 Hill, 157, and McHenry v. Philadelphia, Wilmington & Baltimore Railroad, 4 Harring. 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place, and all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers, to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule render it fit and applicable, that is, during the transit; and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle, thus adopted, is not new; many cases might be cited; one or two will be sufficient. Where a consignee of goods sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon office, or warehouse of the common carrier, it was held, that

the transit was at an end, when the goods were received and placed in the warehouse. Rowe v. Pickford, 8 Taunt, 83. Though this was a case of stoppage in transitu, it decides the principle. But another case in the same volume is more in point. In re Webb, 8 Taunt, 443. Common carriers agreed to carry wool from London to Frome, under a stipulation, that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse, until the consignor was ready to receive it. Wool thus carried, and placed in the carrier's warehouse, was destroyed by an accidental fire; it was held, that the carriers were not liable. The court say, that this was a loss which would fall on them, as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time, when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered; or if, for any reason, the consignee is not there ready to receive them; it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire.

It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees, of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to

be a substitute better adapted to the convenience of both parties. The arrival of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee, of each parcel of goods, or single article, forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case, to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable, that persons, frequently forwarding goods, have a general agent, who is permitted to inspect the waybills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice, for persons forwarding goods, to give notice by letter, and enclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies, produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the waybill. The course seems to be, to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the waybill. If it is not usual to specify the name of a consignee in the waybill, as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver no doubt is, to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is prima facie the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

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In applying these rules to the present case, it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot, before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case, and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied for passenger cars; so that goods may arrive and be unladen, at an unsuitable hour in the night, to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties, and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit. If therefore, for any cause, the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods, in the course of the afternoon on Monday, but not early enough to be carried to the warehouses, at which he was to deliver them; that is, not early enough to suit his convenience. But, for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendant, in regard to this second parcel, on that ground.

Judgment for the defendants.

MOSES v. BOSTON & MAINE R. R., 32 N. H. 523.

(1856)

Case, to recover the value of ten bags of wool lost. * * *

It was proved on the trial that the wool was delivered to the defendants at Exeter, on the 2d of November, 1850, in bags, directed to Townsend & Son, Boston; that on the 4th it was carried over the defendants' railroad in their freight cars, arriving at the freight depot of the defendants in Boston at some time from about one to three o'clock in the afternoon; that, in the usual course of business, from two to three hours was required to unload the freight from the cars into the depot or warehouse, and that the gates were shut at five o'clock, so that no goods could be removed therefrom after that hour until the next morning. It was also proved that on the night of the 4th the warehouse and most of its contents were consumed by fire, and that evidence introduced by the defendants tended to show that the wool was destroyed by the fire. * * *

By consent of the parties the jury were directed to return answers to five questions submitted to them in writing; it being understood that, upon the determination of such of these questions as might be material, a general verdict was to be entered in accordance with the finding of the jury upon those questions, subject to the opinion of this court. The questions were as follows:

1. Was the wool carried over the road and then removed from the cars to the platform of the freight depot in Boston, and separated from other goods before the fire?

2. Was it so carried and removed from the cars a sufficient time before the fire to enable Townsend & Son to obtain possession of it by the exercise of reasonable diligence on the part of the plaintiff and of Townsend & Son?

3. Did the wool fail of being delivered to Townsend & Son by the want of ordinary care and prudence on the part of the defendants?

4. Was any portion of the wool sold by the defendants?

5. Did the plaintiff have any knowledge of the printed notice before the wool was sent over the road?

SAWYER, J. * * * There are two aspects, then, in which the case is to be viewed; one presenting the case of a suit against

the defendants as common carriers, liable for all losses which may happen except such as arise from the act of God or the public enemy, and in which the question of negligence is not involved; the other against them as warehousemen, depositaries, or bailees for hire, and in which they are to be held liable only for negligence.

Considering the suit, then, as one proceeding against the defendants as common carriers, it stands upon the original count in the declaration and the second and fourth amended counts. In these different counts the delivery and the receipt of the wool, the undertaking to carry to Boston and there deliver, and the non-delivery and loss, are alleged in substantially the same manner, except that in the amended counts the allegation is inserted, not contained in the original, that the defendants also undertook to keep the wool safely in Boston a reasonable time after its arrival, and then deliver on request; and in the fourth the allegation is inserted, not contained in either of the others, that the defendants kept a warehouse in Boston for storing goods conveyed upon their railroad, in which they undertook to keep the wool for that reasonable time after its arrival, and then to deliver to Townsend & Co. instead of the plaintiff, as stated in the others. * * *

The position taken at the trial that the defendants had limited their liability as common carriers to the time when the wool was taken into the depot, by a public notice to that effect, would not have availed the defendants if the finding of the jury upon the fifth question had established the fact that the notice was brought to the knowledge of the plaintiff before the wool was sent. In the case of Moses v. Railroad, 4 Foster 71, it was expressly decided that a public notice to the effect that the railroad company would not be responsible for loss or injury to goods in their hands as carriers, except such as might arise from negligence, would not have the effect thus to limit their common-law liability, even when brought home to the knowledge of the owner. This renders it unnecessary to consider any question arising upon the character of the instructions given upon the fifth question; and the only remaining point in the case, considered as an action against the defendants as carriers, upon the original count and the second and fourth amended counts, is that involved in the second question, raising the principal in-

quiry in the case, when does the liability of a railroad company, as carriers of goods, terminate?

The wool in this case was received and conveyed by the defendants in their ordinary employment as common carriers. It was not of a value disproportionate to its bulk, and was such that no deception could have been practiced upon them as to the extent of the risk they incurred. In the transportation of such commodities, their responsibility as carriers commences with the receipt of the goods, though not put by them immediately on the transit, and it ceases only when they have reached their destination and their control over them as carrier has terminated. That control must continue until delivery, or a tender or offer to deliver, or some other act which the law can regard as equivalent to a delivery. The delivery of goods conveyed by railroad is necessarily confined to certain points on the line of the railroad track. Railroad companies cannot, like wagoners, pass from warehouse to warehouse, and there discharge their freight to the various consignees upon their own premises. They consequently establish certain points as places of delivery, and there unlade their cars of such of the freight as may most conveniently find its ultimate destination from those respective points. But while it is in the process of unloading, and afterwards, while awaiting removal, it must be protected from the weather and from depredation. Freight is brought over the road at all hours, by night as well as by day, and the trains must necessarily be more or less irregular in the hours of their arrival. It cannot be required of the consignee to attend at the precise moment when his goods arrive, to receive and take care of them, and the company cannot discharge themselves from responsibility by leaving them in an exposed condition in the open air. Until the goods have passed out of their custody and control into the hands of the proper person to receive them they have a duty to perform in the preservation and protection of the property, even after their responsibility as common carriers is at an end. Smith v. Railroad, 7 Foster 86. It thus becomes a matter of necessity for them to provide depots, or warehouses, for the reception of freight at the stations established for its delivery. If the owner or consignee, or other person authorized to receive the goods, is present at the time of the arrival, and has opportunity to see that they have arrived, and to take them away, this may be re-

garded as equivalent to a delivery. They must be understood, after this, to remain in the charge of the company, for his convenience, as depositaries or bailees for hire. In such case the grounds upon which the common-law liability of the carrier is made to rest have so far ceased to exist that there is no longer any just occasion for holding the company to that stringent responsibility in reference to those goods. They are no longer in the course of transportation, beyond the reach of the owner, and under the exclusive control and observation of the carrier. The owner has again got sight of his property, and is in a situation to some extent to oversee and protect it. Nor is he any longer under the difficulties and embarrassments in attempting to make proof of subsequent fraud or negligence as when it was on its passage beyond the reach of his observation, and under the private control of the carrier. The facilities and temptations to fraud and collusion in the embezzlement or larceny of the goods are also removed, or at least greatly diminished.

It is upon these considerations that the strict liability of the carrier is founded. "It is a politic establishment," says Lord Holt, in Coggs v. Bernard, 2 Ld. Raym. 918, "contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing, for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, &c., and yet doing it in such a clandestine way as would not be possible to be discovered."

In 2 Kent's Com. 602, it is said that the rule subjecting the carrier to this strict responsibility is founded on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unraveled. If it were not for the rule, the carrier might contrive, by means not to be detected, to be robbed of his goods, in order to share the spoil.

That the danger of loss by such collusion is not now so prominent a consideration as in the semi-barbarous times when the rule was first adopted, is quite probable. But upon this point it is well said by the court in Moses v. Railroad, before cited, that the immense increase of this business, the great value of the commodities now necessarily entrusted to the charge of common

carriers, and the vast distances to which they are to be transported have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have added greatly to the opportunities and temptations of the carrier, who might be disposed to neglect or violate his trust. The reasons upon which the rule is founded apply in all their force to railroad companies as carriers, and the same considerations of public policy which led to its adoption, continue to require that it be maintained in all its rigor, as to them. Any relaxation of the rule must be attended only with mischief. Many of the most eminent English judges prior to the acts of II. Geo. IV. and I Wm. IV. expressed regret that their courts had sanctioned the doctrine that the carrier had the right to limit his liability by a public notice, and predicted the necessity for the legislative interference which resulted in those acts restoring the strict responsibility of the ancient rule, in order to remedy the mischiefs which that relaxation had introduced. Moses v. Railroad, qua sup.

The inquiry then is, at what moment after the goods conveyed by a railroad company in their cars have reached the point on the line of the railroad where they are to be delivered, may the reasons upon which the common-law liability of the carrier is founded be said to cease when there is no person present at their arrival authorized to receive them, and ready to take them away.

That it is the duty of the consignee to come for them is clear, but it would be quite as impracticable for him to be at the place of delivery at the precise moment of their arrival, or of their being unladen from the cars, without actual notice to him of their arrival, as it would be for the company to diverge from their line of road to deliver them at his place of business, or to send notice to him of their arrival, before proceeding to unload them. The arrival may be in the night, or after the expiration of business hours at the station, or at so late a preiod before it as to render it impossible for him to get them away within the hours of business. If under such circumstances they have been removed from the cars and placed in the warehouse, it cannot be said that they are so placed and kept there until the gates are opened, and business resumed upon the following day, for any purpose having reference to the convenience and accommodation of the owner or consignee, nor can the proceeding

upon any sound view be considered as equivalent to a delivery. The same persons—the servants of the company—continue in the exclusive possession and control of the goods as when they were in their transit, and they are equally shut up from the observation and oversight of all others. The consignee had had no opportunity to know that they have arrived and in what condition, and in no better situation to disprove the fact, or to question any account the servants of the company having them in charge may choose to give of what may happen to them after they are so removed from the cars, or what has happened prior thereto, than before. If purloined, destroyed, or damaged by their fraud or neglect, subsequent to their removal and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually in transitu—the declarations of the servants of the company—they having, it may well be supposed, feelings and interest adverse to him, and knowing that he has no evidence of command from other sources to impeach their statement. It is obvious, too, that the opportunities and facilities for embezzling the goods and for other fraudulent or collusive practices, must continue to be equally tempting after their removal under such circumstances, as before. The risk of detection in some respects may be made even less than before, by the greater facilities which the servant of the company in charge of the warehouse has of manufacturing evidence of a burglary or creating proof of the destruction of the goods by fire set by himself for the purpose of concealing his agency in their larceny. For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give to them oversight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see, by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in the course of transportation. The same broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest, have equal application after the goods are removed into the warehouse as before, until the owner or con-

signee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who thus continue to retain them in charge, by holding that they shall continue subject to the risk.

It is no satisfactory answer to this view to say that the company, having provided a warehouse in which to store the goods for the accommodation of the owner, after the transit has terminated, may be regarded, by their act of depositing them in the warehouse, as having delivered them from themselves as carriers, to themselves as warehousemen. The question still is, when, having a proper regard to the principles which lie at the basis of their carrier liability, and to the protection and security of the owner, can this transmutation of the character in which they hold the goods be said to take place, and this constructive delivery to be made. If this is held to be at any point of time before there can be opportunity to take them from the hands of the company, then may the owner be compelled to leave them in their possession under the limited liability of depositaries, or bailees for hire, contrary to his intention, and without any act or neglect on his part which may be considered as indicative of his consent thereto. It may have been his intention to take them from their possession at the earliest practicable moment for the reason that he may not be disposed to entrust them to their fidelity and care without the stimulus to the utmost diligence and good faith afforded by the strict liability of carriers. If he neglects to take them away upon the first opportunity that he has to do it, he may be said thereby to have consented that they shall remain under the more limited responsibility. But upon no just ground can this consent be presumed when his only alternative is to be at the station where they are to be delivered at the arrival of the train, at whatever hour that may happen to be, whether in the day or the night, in or out of business hours, and regardless of all the contingencies upon which the regularity of its arrival may depend. It is to be supposed that the consignee has been advised by the consignor of the fact that the goods have been forwarded, and that he has taken or is prepared to take proper measures to look for them upon their arrival, and to remove them as soon as he can have reasonable opportunity to do so. It must be supposed, too, that he is informed of the usual course of business on the part of the company, and of their agents, in the

hours established for the arrival of the trains, and in unlading the cars and delivering out goods of that description, and that he will exercise reasonable diligence in reference to all these particulars, to be at the place of delivery as soon as may be practicable after their arrival, and take them into his possession. The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience and accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away. If his particular circumstances require a more extended opportunity, the goods must be considered after such reasonable time as, but for those peculiar circumstances, would be deemed sufficient to be kept by the company for his convenience, and under the responsibility of depositaries or bailees for hire only.

In the case now under consideration, there was conflicting evidence as to the time when the train by which the wool was carried, arrived at the depot in Boston. The evidence on the part of the defense tended to show that it arrived at the usual time—between one and two o'clock in the afternoon; while that of the plaintiff tended to show that it did not arrive until three o'clock. The gates of the depot were closed at five, and from two to three hours were usually required for unloading the cars. Upon the view of the evidence most favorable to the defendants, there was but a period of from three to four hours, at the longste, for the consignee to have come and taken away the wool, before the gates were closed; and it was destroyed before they were reopened for the purpose of delivering out the goods. This view proceeds upon the supposition that the work of unlading the cars was commenced immediately upon their arrival; and in the process of unloading, ordinarily occupying from two to three hours, the wool happened to be the first article taken from the cars and was at once ready for delivery. Upon a view less favorable to the defendants, the jury might have found, upon the evidence in the case, that the train arrived at three, and that the wool was unloaded at six—one hour after the closing of the gates. That the verdict in answer to the second question submitted to the jury was therefore warranted by the evidence, is

quite clear; and as there are no legal exceptions to the proceedings upon the trial, so far as they relate to this point, the answer of the jury to that question establishes the fact that the consignees had no reasonable opportunity, after the wool was taken from the cars, to come and inspect it, so far as to see whether from its outward appearance it corresponds with the letter of advice from their consignee, and to remov eit before it was destroyed. This fact being established, upon the views of the law entertained by the court, the transit had not terminated, and the defendants continued liable for the wool as carriers, down to and at the time of the loss; and the general verdict entered for the plaintiff may well be sustained upon the original and the second and fourth amended counts.

We are aware that this view of the liability of railroad companies as carriers conflicts with the opinion of the Supreme Court of Massachusetts, as pronounced by the learned chief justice of that court in the recent case of Norway Plains Co. v. these defendants, 1 Gray 263. In that case it was held that the liability as carriers ceases when the goods are removed from the cars and placed upon the platform of the depot ready for delivery, whether it be done in the daytime or in the night—in or out of the usual business hours—and consequently irrespective of the question whether the consignee has or not an opportunity to remove them. The ground upon which the decision is based would seem to be the propriety of establishing a rule of duty for this class of carriers of a plain, precise and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such character is not to be doubted; but with all our respect for the eminent judge by whom the opinion was delivered, and for the learned court whose judgment he pronounced, we cannot but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes.

It is unnecessary, then, to consider the exceptions taken upon the other view of the case, as an action against the defendants for negligence in their care of the wool after their liability as carriers had ceased.

Judgment upon the verdict.

BALDWIN v. AMERICAN EXP. CO., 23 Ill. 197.

(1859)

This was an action of assumpsit, brought by Herman Baldwin against the American Express Company, to recover the value of a package of money sent by the plaintiff to D. J. Baldwin, at Madison, Wisconsin.

It was stipulated on the trial that the defendant received from the plaintiff a package containing $1,000 in money, to be forwarded and delivered to David J. Baldwin, at Madison, Wisconsin, and that the same had never been received by Baldwin or his agents.

The defendant then read in evidence the following order:

"H. A. Douglas, ag't Am'n Ex. Co., please deliver to C. T. Flowers, or Dane County Bank, any pkgs. that may come to your office for me.

"Baraboo, Wis., Aug. 8th, 1857.

"D. J. Baldwin."

The proof further showed that the package in question arrived at Madison, Wisconsin, on September 8, 1857, directed to D. J. Baldwin, Baraboo, "marked" $1,000. The package was not delivered, or any entry thereof made in the delivery book, but the clerk of the bank was informed of the arrival of the package, and so was the clerk of Mr. Flowers, to whom the bank directed the express company to deliver it. The other material facts of the case are stated in the opinion of the court. The court below found for the defendant.

MR. JUSTICE BREESE delivered the opinion of the Court:

The question in this case is, was there sufficient evidence of a delivery of this package, or of an offer to deliver, as will discharge the liability of the express company as a common carrier, or change it into the liability of a depositary simply.

There is no count in the declaration against the defendant, charging any other contract with it than that as a common carrier, and consequently, all evidence in relation to the security of the safe, or the absence of a night watch, is out of the question. The defendant can only be liable as a common carrier, and in no other character on this declaration. We do not consider there is any offer to deliver this package either to the officers of the Dane County Bank or to Flowers, or to anyone in his employment authorized to receive it, proved.

The testimony of Douglas, the agent of the express company, taken in connection with that of Memhard, the messenger, of Treadway, one of the employes of the bank, and of Brown, the cashier of the bank, and of Willis, the clerk of Flowers, all go to show that the package was not ever tendered by Douglas, to either of them, and he shows most clearly that the package was at no time ready for delivery, either to the bank or to Flowers, for he says it was the custom at the express office to enter the packages received in a delivery book, which is also the receipt book, and by which book they deliver to consignees, who sign a receipt in this delivery book. Now this package was never entered on this book, and of course was not ready for delivery.

The bank had no opportunity to refuse to receive the package, for it was not offered to any officer of the bank. One or more of them was informed there was such a package there for Baldwin, but though the bank office was not five steps distant, and in the same building with the express office, the express agent did not take it to the bank, and there offer to deliver it. It was not offered to Flowers, or his clerk, at his place of business. The clerk was merely told by the messenger, when making his rounds, there was a package for Baldwin at the office, and the clerk said he would "go round and see about it." When at the office, the package was not offered to him, and if it had been, he would not have been authorized to receive it at the office, it not having been entered on the delivery book, and the custom of the express company being shown to be, at Madison, to deliver by that book to the consignees in person, or to their authorized agent, at their place of business. An offer to deliver at the express office, if that was proved, under such circumstances, amounted to nothing.

Mr. Fargo, the general agent of this company, says, "We deliver goods actually to the persons, or by notice," by which we would understand, that at important towns on their routes, and at the termination of their routes at important towns, they deliver personally; at way-stations by notice, and by depositing the goods or packages in a safe receptacle, if that be the known custom of the company. Such a custom may be reasonable, and therefore legal, and if well established, parties will be presumed

as having contracted with reference to it; but at small stations, where the business will not justify them in keeping a special delivery agent, prompt notice should be given to the consignee, in order to discharge them from the strict liability of common carriers. Mr. Van Vleet, the check clerk in the United States Express office, says that "the general method of conducting an express business is to take receipts in a receipt book, which is called the delivery book." This was the custom, as proved by Douglas, of the defendants, at Madison.

The cases cited by defendants' counsel, of vessels and railroad companies delivering goods at their landings or depots with or without notice, cannot meet such a case as this, where the undertaking is to deliver in person.

It is the settled doctrine of England and of this country, that there must be an actual delivery to the proper person, at his residence or place of business, and in no other way can he discharge himself of his responsibility as a common carrier, except by proving that he has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or a public enemy. Stephenson v. Hart, 4 Bing. 476; Garnett v. Willan, 5 Barn. & Ald. 53; Duff v. Budd, 3 Brod. & Bing. 177; Hyde v. The Navigation Co., from the Trent to the Mersey, 5 T. R. 389; 2 Kent's Com. 604; Gibson v. Culver, 17 Wend. 305; Eagle v. White, 6 Wharton, 505; Moore v. Sheindine, 2 Har. & McHen. 453; Chickering v. Forolm, 4 Mass. 453; Young v. Smith, 3 Dana, 92.

It is necessary, in order to give one security to property, this rigid rule should obtain, and it has for years been enforced against common carriers. They are considered as insurers, and are under that responsibility; and to prevent litigation, and avoid the necessity of going into the examination of matters difficult to be unraveled, the law, very justly, in case of loss, presumes against them. The rule being so rigorous, they are entitled to demand, and do demand, a compensation for their services in full proportion, at least, to the risks incurred. The company in this case, have shown no excuse for the non-delivery of the package. The facts and the law are against them. * * *

The judgment of the circuit court is reversed, and the cause remanded.

Judgment reversed.

McMILLAN ET AL. v. MICH. S. &. N. I. R. R. CO., 16 Mich. 79. (1867)

These were three actions on the case brought against defendants as common carriers, to recover the value of certain goods burned in their depot at Detroit, in April, 1866.

The defendants pleaded the general issue. The cases were heard together without a jury, on stipulations.

COOLEY, J.: The first question to be considered in this case is, whether the defendants, in respect to the business transacted by them on the line of the Detroit, Monroe & Toledo railroad, are subject to the liabilities imposed by the general railroad law of the state, under which the road named was constructed, or may claim the benefit of such exemptions as are contained in their original charter. As the charter expressly provides that for goods in deposit awaiting delivery, the company shall be liable as warehousemen only (Laws 1846, p. 185), and contains no prohibitory clauses which would prevent their making any contract which it is lawful for a common carrier to make, while the general law prohibits any company formed under it from lessening, or directly or indirectly abridging their common-law liability as carriers (Comp. L., § 1992), it is possible that important consequences may depend upon the determination of this question.

The doubt, if any, springs from that provision in the general railroad law which authorizes any railroad company in the state to "make any arrangements with other railroad companies, within or without this state, for the running of its cars over the road of such other company, or for the working and operating of such other railroads as said companies shall mutually agree upon:" Comp. L., § 1993. The defendants are lessees of the Detroit, Monroe & Toledo road, and while they admit that all those provisions of the general railroad law which measure the extent of property rights, prescribe the width of the road, the mode of use, speed, ringing of bells, or the manner of enjoyment, must be applicable to them as lessees, as defining and constituting a part of the right itself, yet they claim that obligations springing from the use depend upon their own charter, under which alone the contracts are to be made or the acts done from which the obligations spring.

I have been unable to discover anything in the general railroad law which supports this distinction, or which indicates an intention on the part of the legislature that the lessee of a road, constructed under that law, should take the road discharged of any of the conditions or burdens imposed for the benefit of the public upon the lessor. The authority to "work and operate" the road of a corporation does not necessarily imply that the operating is to be otherwise than under the obligations imposed upon the corporation by its charter; and as grants of corporate franchises are to be construed with strictness. (2 Kent, 298; Charles River Bridge v. Warren Bridge, 11 Pet. 544; Perrine v. Chesapeake & Delaware Canal Co., 9 How. 172; Bradley v. N. Y. & N. H. R. R. Co., 21 Conn. 294; Chenango Bridge Co. v. Binghamton Bridge Co., 24 N. Y. 87, and 3 Wallace, 51), we are not at liberty to infer an intent in the legislature to relieve the road in the hands of the lessee from obligations resting upon the lessor, unless such intent is clearly expressed, or, at least, is necessarily to be inferred. There is no such clear expression in the present case, and the inference, I think, is against any such intent. The legislature, by the general law, established the rules under which they would allow new roads to be constructed and operated; and when they gave permission to the proprietors to lease them to others, it is to be presumed, in the absence of any declaration to the contrary, that the intention was not to dispense with those regulations which they have judged important for the public interest and protection.

The power to lease does not imply the power to transfer greater rights than the lessor himself possesses; and where the obligations assumed by the lessor, pertaining to the management of his business, and the liabilities which should spring therefrom, were the consideration upon which the franchise was granted, it would be a violent inference that the legislature designed to waive them when they are no less important to the public protection after the lease than before.

I think, therefore, that the liability which rests upon these defendants is that of the Detroit, Monroe & Toledo Railroad Company, which by law is not permitted to lessen or abridge its common-law liability as common carriers. What that liability is when they have transported property over their road and deposited it in their warehouse to await delivery to the consignee

is the next question demanding consideration.

On this point three distinct views have been taken by different jurists, neither of which can be said to have been so far generally accepted as to have become the prevailing rule of the courts.

First. That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This is the rule of the Massachusetts cases—Thomas v. Boston & Providence R. R. Co., 10 Met. 472, and Norway Plains Co. v. Boston & Maine R. R. Co., 1 Gray, 263—and those which follow them.

Second. That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away, in the common course of business: Morris & Essex R. R. Co. v. Ayres, 5 Dutch, 393; Blumenthal v. Brainerd, 38 Vt., 413; Moses v. Bost. & Me. R. R., 32 N. H., 523; Wood v. Crocker, 18 Wis., 345; Redf. on Railw., 3d ed., § 157.

Third. That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time, in the common course of business, to take them away after such notification; McDonald v. W. R. R. Corp., 34 N. Y., 497, and cases cited; 2 Pars. on Cont., 5th ed., 189; Ang. on Carriers, § 313; Chitty on Carriers, 90.

The rule as secondly above stated proceeds upon the idea that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand ready to take it away when received. It is assumed to be simply a question of reasonable diligence with the consignee whether he ascertains the receipt of his consignment or not; the regularity of the trains being such as to leave him without reasonable excuse if he fails to inform himself.

There may be railroad lines in the country where the application of this rule would do injustice to no one. If the business is not so great but that the freight trains can be run with the same

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never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare Scholes v. Ackerland, 13 Ill. 574, and Crawford v. Clark, 15 Id., 561, with Richards v. M. S. & N. I. R. R. Co., 20 Id., 404, and Porter v. Same, 20 Id., 407. See, also, Chicago & R. I. R. R. Co. v. Warren, 16 Id., 502, where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside.

But it may well be doubted whether the distinction rests upon sufficient reasons. The man who sends his goods by railroad, and who desire to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier. If any other relation than that is formed between them, it is one that the law forms, upon consideration springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the incidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he desires is, not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can claim any exemption from their liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures.

If the road has no warehouse, the cars must remain standing on the track until the owner can come and receive his goods,

regularity as those for passengers, and the freight can always be sent forward immediately on being received for the purpose, a notice from the consignor will usually apprise the consignee with sufficient certainty when the goods may be expected. But on the long through lines such regularity is quite impracticable. Freight must be sent forward from the carrier's warehouse with a promptness depending upon the pressure of business; or, in other words, as it may suit his convenience and his interest to forward it. This may be many days, or even weeks, after its receipt, or it may be immediately. It is not always in the power of the carrier to give reliable information upon the subject, and unavoidable delays frequently intervene after the transit has commenced. To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points.

The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods, is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is almost an universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who therefore

never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare Scholes v. Ackerland, 13 Ill. 574, and Crawford v. Clark, 15 Id., 561, with Richards v. M. S. & N. I. R. R. Co., 20 Id., 404, and Porter v. Same, 20 Id., 407. See, also, Chicago & R. I. R. R. Co. v. Warren, 16 Id., 502, where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside.

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If the road has no warehouse, the cars must remain standing on the track until the owner can come and receive his goods,

or, if they are unloaded, the company must not only establish a watch to prevent thefts, but at their peril must protect against injuries by the elements. Landing the goods on the platform, it is agreed on all hands, does not alone discharge the carrier. And it seems to me that a consideration of the immense carrying trade of the country will force one to the conclusion that it cannot possibly be either properly, expeditiously or profitably done except with the conveniences afforded by the railroad warehouses, which afford the easiest, cheapest and most effective means by which carriers are enabled to protect themselves against losses in that capacity.

At the great centers of commerce, it would be impossible to transact the amount of business now done, if the cars must stand upon the track until the goods carried can be delivered from thence to the consignees. Unloading them in immense quantities upon open platforms would expose them to destruction. At the less important points the same thing is true, but in less degree. It would seem, therefore, looking only to the interest of the carriers, that the reasons which require the construction of warehouses are imperative. Only by means of them can they keep their tracks clear for trains, or protect against the destruction of goods of which they are insurers. And wherever the business is large, warehouses are required also, to enable the companies to carry out a system of separation and classification of goods received, without which it would be quite impossible to conduct the business with facility or profit. The warehouses are also absolutely essential in connection with the receipt and dispatch of goods to be sent from each point, and in respect to which the railroad company are unquestionably liable as carriers from the time of their receipt. In every view, therefore, they seem indispensable to the business of the carriers; and being constructed with reference to it, they are properly nothing more than an extension of the platforms upon which the companies receive and deliver goods, with walls and roofs added to facilitate, guard, and to protect against injuries by the elements.

The interest, on the other hand, which the consignee has in the warehouse, is much less direct and important. It may facilitate the delivery of goods, but the carrier is liable if he fail to deliver in reasonable time. The risk of loss and injury will be less, but against these the carrier insures. In no proper sense can

the warehouse be said to be for his accommodation; and if the obligations of the carrier to him are to be diminished by its erection, he might well prefer that it should not be built. The rule which changes the carrier into a warehouseman against the will of the owner of the property, on the ground solely that he has erected convenient structures for the storage, but which structures are absolutely essential to his business as carrier, seems to me to be a departure from the rule of the common law upon reasons which do not warrant it. It is a rule which allows the insurer to absolve himself from obligations to the insured, by supplying himself with conveniences for the transaction of his business, and with the means of protection against loss or damage.

A critical examination of the cases on this subject would scarcely be useful. As they cannot be reconciled, the court must follow its own reasons. I am unable to discover any ground which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If, by understanding with the consignee, the goods were to remain in store for a definite period, or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such understanding, sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties and burdensome to neither, and it will tend to promptness on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them.

Whether the clause in the general railroad law forbidding companies formed under it from lessening or abridging their common-law liability as carriers, prevents their entering into contracts by which their employers release them from any of their liability, is not clear upon the terms of the clause itself. Such contracts are not expressly forbidden, and the general tendency of legislation in modern times has been to relax, rather than to

render more severe, the strict rules of the common law in regard to carriers, of which our own state presents an example in the legislative exemption of the principal companies from liability as carriers for goods in their warehouses awaiting delivery. And a clause which should forbid parties from entering into any such agreements with carriers as they might conceive to be for their interest, would hardly be looked for in the general law, unless strong reasons were known to have existed for its adoption.

When that law was passed, a controversy had been going on between common carriers and the public in respect to the notices given by the former, by public advertisement and otherwise, by which they sought to relieve themselves from some portion of their common-law liability, whether those employing them assented or not. The courts in this country had generally held these notices ineffectual; but they still continued to be given, and to be insisted upon as possessing legal force. I do not perceive in the clause in question any intention to go further than to put an end, by the fundamental law of these organizations, to any further controversy upon that ground. In view of the extent to which the courts had gone in England, in giving force to such notices, no one can say that the precaution was needless. The companies are forbidden to lessen or in any way abridge their liabilities as common carriers, but the person sending goods by them is not forbidden to release them from such liabilities, or from any portion thereof, for any consideration which to him is satisfactory. In other words, the law compels these companies at all times, at the option of those sending goods by them, to carry the goods as insurers. If, on the other hand, the carriers can make it for the interest of the party to relieve them from this liability wholly or in part, a contract to that effect, if fairly made, and embracing no unreasonable condition, is not opposed to public policy, and to forbid it would seem an unnecessary restraint upon freedom of action. See Bissell v. N. Y. C. R. R. Co., 25 N. Y., 448. The distinction between a restriction by the carrier himself and a contract by which another party releases him from obligations, was pointed out by this court in Michigan Central R. R. Co. v. Hale, 6 Mich., 243, and is the same which is applicable here. Many things are transported by railroad in respect to which it may be for the mutual interest of both parties that special contracts be made. Live stock are usually accom-

panied and cared for by the owner or his agent, under special agreements, and in some other cases the owner prefers to assume such general oversight and control as is inconsistent with the full common-law liability of the carrier. It has not been generally supposed that the clause under consideration forbade special contracts in such cases, and the legislature of 1867 must have considered them lawful when they provided that all contracts modifying the common-law liability of railroad companies as carriers should be wholly in writing: Laws 1867, p. 165. This enactment was evidently designed not to enlarge the powers of railroad companies, but to impose restraints upon an existing authority to make contracts.

A much more difficult question is, what shall constitute the proof of a contract, in the absence of distinct evidence that the parties have consulted and agreed upon terms. The practical difficulty, amounting almost to an impossibility of bringing the carrier and his employers together on every occasion for the discussion of terms, has led to the adoption by carriers of a printed form of contract, which is put into the hands of the consignor, and by its terms purports to bind him to its conditions; but it is strongly insisted that there ought to be more satisfactory evidence of assent on the part of the consignor to modify any of his common-law rights, than is derived from the mere receipt of a paper from the carrier, framed to suit the interest of the latter, and which the consignor may never read.

There are some matters in respect to which the carrier may qualify his liability by mere notice. Mr. Greenleaf says: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly:" 2 Greenl. Ev., § 235; see Western Transportation Co. v. Newhall, 24 Ill., 466. These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier

may determine the manner in which he is authorized to make delivery: Farmers & Mechanics' Bank v. Champlain Trans. Co., 16 Vt., 52; same case, 18 Id., 131, and 23 Id., 186. But beyond the establishment of such rules, the force of a mere notice cannot extend. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability. "A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment:" Pierce on Railroads, 416. See Hollister v. Nowlen, 19 Wend., 234; Cole v. Goodwin, 19 Id., 251; Jones v. Voorhees, 10 Ohio, 145; Bennett v. Dutton, 10 N. H., 487; N. J. Steam Navigation Co. v. Merchants' Bank, 6 How., 382; Moses v. Boston & Maine R. R. Co., 24 N. Y., 71; Kimball v. Rutland & Burlington R. R. Co, 26 Vt., 256; Slocum v. Fairchild, 7 Hill, 292; Dorr v. N. J. Steam Navigation Co., 4 Sandf., 136, and 11 N. Y., 485; Michigan Central R. R. Co. v. Hale, 6 Mich., 243. The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists: N. J. Steam Navigation Co. v. Merchants' Bank, 6 How., 382, per Nelson, J.

The evidence of such a contract in the present case consists, first, of the defendant's mode of doing business, and, second, of what are called in the case bills of lading, and which contain the supposed limitations. It is admitted by the plaintiffs that all the bills of lading in use by these defendants, and all the contracts of affreightment, the instructions to agents, and the printed rules posted in all the depots and station houses of defendants for the past ten years, have contained clauses exempting them from liability for loss by fire, and providing that when goods are in the depot awaiting delivery to consignees, the company will be liable as warehousemen only, and not as

carriers; and that plaintiffs have been accustomed to de business with defendants, and to receive and send goods over their road under bills of lading of this description.

There are several reasons why knowledge in plaintiffs of defendant's usage to make restrictive contracts cannot control the present case. In the first place, knowledge of such usage can in no case of the kind be allowed force beyond that which could be given to notice of an intention on the part of the carrier to restrict his liability, brought home to the party in any other mode; and we have already seen that the force of such notices is exceedingly circumscribed. And it can hardly be seriously claimed that the plaintiffs, by accepting restrictive contracts in some cases, have thereby debarred themselves from insisting upon their common-law rights thereafter. In the second place, the defendants have no power under the law to establish a usage restricting their liability; as that would come directly in conflict with the clause in the general railroad law heretofore quoted. And in the third place, if this were otherwise, the usage would be irrelevant to the present case, since the proof relates to dealings between the parties to this suit at Detroit, and to usages understood by the plaintiffs there, while the contracts here in question were in each instance made with consignors at a distance, and in most cases by other railroad companies, whose usages do not seem to be uniform.

It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part of the contract for transportation and to be regarded as assented to by the consignors, notwithstanding they may not have read them.

A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the terms therein expressed to their destination, and there delivered to the parties therein designated: Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation; and is the measure of their rights and liabilities, unless where fraud or mistake can be shown: Redf. on Railw., 307-390, and notes; Ang. on Carriers, § 223. It has acquired from usage a negotiable character, and the carrier may be estopped, as against the indorsee for value, from showing mistakes in giving it: Redf. on Railw., 307. Whether the contracts which railroad companies

are accustomed to give on the receipt of goods for transportation, and which are usually called by the same name, are subject to all the same incidents as the bills of lading proper, we need not now consider; but it will not be disputed that they fix the rights and liabilities of the parties when their terms have been agreed upon, and it is, I think, the weight of authority, and certainly the rule in this state, that the carrier may stipulate in them for a limitation of his common-law liability; Michigan Central R. R. Co. v. Hale, 6 Mich., 243.

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one (Brown v. Eastern R. R. Co., 11 Cush., 97); and if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else—as, for instance, a mere receipt for money—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such: King v. Woodbridge, 34 Vt., 565. But, except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not. The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them or inquiring into their terms—taking whatever the railroad companies see fit to give them, and that they are thus liable to be imposed upon and defrauded, unless the courts interfere to protect them. Or, if we may be allowed to state the same thing in different words, as everybody is negligent in these matters, and will not give the necessary attention to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extraneous evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to

exercise it, it may be important to consider, at the outset, whither it will lead us. Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are every day given and received without being read by the parties, though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are still more often received without examination. In the absence of fraud, accident or mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties compotes mentes in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common-law liability. But the common law does not establish the rates of freight, or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freight in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs, would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract.

I do not find any case in which a court has assumed to set aside such a contract on the ground that the party had failed to read it. An exemption from liability from losses arising from specified causes, when embodied in the bill of lading has frequently been recognized as a part of the contract, though it did not distinctly appear to have been brought to the consignor's notice (Davidson v. Graham, 2 Ohio N. S., 131; Par-

sons v. Monteath, 13 Barb., 353; York Co. v. Central R. R. Co., 3 Wall., 107; Dorr v. N. J. Steam Nav. Co., 11 N. Y., 491; and, in the case last referred to, it is said that the exemption, when embodied in the bill of lading, must be deemed to have been assented to by the parties. The same presumption would seem to have been acted upon in More v. Evans, 14 Barb., 524); Kallman v. Ex. Co., 3 Kans., 205, and Whitsides v. Thurlkill, 20 Miss., 599; and it is in accordance with the general rule applicable to written contracts.

It is said, however, that these special contracts must be held void for want of consideration, unless it is shown that, in return for the release of the carrier from his extraordinary liability, he, on his part, has made a deduction in the rates of freight. What does appear in the present case is, that the carrier, in consideration of the promise by the consignor to release him from certain liabilities, and to pay him certain moneys, agrees on his part to carry the goods for the sum named. I do not see how we can assume that the charges are the same that they would have been had the release been omitted. If, by the charter of a railroad corporation, maximum rates had been established, and the corporation had attempted to charge these rates for a restricted liability, a case would be presented coming within the principle of this objection (Bis. v. N. Y. C. R. R. Co., 25 N. Y., 449, per Selden, J.); but no such case is before us here, and a consideration appears which, for aught that is shown by the record, is sufficient.

It was also said on the argument, that a rule such as we have now laid down would place the public at the mercy of the railroad companies, who would refuse to give any other than restricted bills of lading. It is enough for us to say, in this case, that railroad companies chartered as common carriers have no such power, and the consignor can assent to the restriction in each instance, or refuse to assent at his option. If the corporations decline to transport goods as common carriers, when that is the condition upon which they hold their franchises, there would be no difficulty, I apprehend, in applying the proper remedy.

It will now be necessary to examine the various bills of lading, in reference to the particular limitations which they contain. Two of those given by the Cincinnati, Hamilton & Dayton R.

R. Co. contain no restriction; the other excepts against liability for "unavoidable accidents and fire in depot." Those issued by the defendants contain, among others, a similar exception. It is claimed by the plaintiffs that these and similar exceptions will not shield the defendants, because the loss in the present case was the result of the negligence of their officers or servants, against liability for which it was not lawful for them to contract.

Whether the rule that a carrier, on grounds of public policy, is not to be permitted to contract for exemption from liability for his own negligence (Fairchild v. Slocum, 19 Wend., 329; York Company v. Central R. R. Co., 3 Wall., 113; 3 Pars. on Cont., 5th ed., 249), can properly be so extended as to prevent corporations contracting against liability for the negligence of their officers or servants, or any classes of them, and, if not, then whether the general words of exemption here employed ought to be construed to embrace the negligence of such officers and servants (Wells v. N. J. Steam Nav. Co., 8 N. Y., 379; Schieffelin v. Harvey, 6 Johns., 179; Alexander v. Greene, 7 Hill, 533), are questions I do not care to discuss in this case, inasmuch as I think that no such negligence is shown. What was relied upon was the fact that barrels of benzine were carried over the road of defendants, landed in their depot at Detroit, and then passed over to the Detroit & Milwaukee Railroad Company, which occupied the other end of the same warehouse; that some of these barrels were in a leaky condition; and that while being handled by the employes of the latter company the escaping gas took fire from a lantern, and resulted in the destruction of the warehouse and its contents. From this it appears that the fire took place after the inflammable fluid had passed out of the hands of the defendants. The fact that they had carried it over their road had nothing to do with its ignition. If it should be conceded to be negligence in the company to receive so dangerous an article among their freights, yet if no loss resulted while it remained in their custody, it would be difficult to hold them responsible for accidents happening from its subsequent handling. When the Detroit & Milwaukee company received it upon their premises, it was of no consequence from whence it came, and any accident which might result would have no relation to the source from which it was received. It would

be as legitimate to hold a merchant responsible from whom it might have been bought, as the carrier from whom it had been accepted. If we are to trace causes back, we need not stop at the preceding carrier, but, with similar reason, might hold the man liable who made the leaky barrels, or the person from whom the first carrier received them filled. The law can only look at the proximate causes of an injury, and not at those remote circumstances that may have contributed to those causes: Olmstead v. Brown, 12 Barb., 657; Butler v. Kent, 19 Johns., 223; Whately v. Murell, 1 Strob., 389; Matthews v. Pass, 19 Ga., 141; Platt v. Potts, 13 Ired., 455.

Some question was made on the argument whether the consignors can be held, in the absence of explicit evidence on the subject, to have authority to enter into special contracts with the carrier which shall be binding on the consignee. His authority, I think, is to be presumed; and the carrier, is under no obligation to inquire into it: Moriarity v. Harnden's Exp., 1 Daly, 227. It is a question of more difficulty whether the Ohio bills of lading would govern the transportation for the whole route. By their terms, the Cincinnati, Hamilton & Dayton Railroad Company acknowledge the receipt of the goods in good order, to be delivered in like good order "at Toledo for Detroit," unto the plaintiffs or their assigns, they paying freight. No evidence is given of any custom that these contracts shall govern the whole distance; nor does the case show whether the rates of freight specified are for the delivery at Toledo or at Detroit. The words employed only import that the goods are to be carried to Toledo, and from thence forwarded; and in the absence of any special custom on the subject, it would seem that the company giving these bills fully discharged their duty when they had delivered the goods to the defendants at Toledo.

There is a number of English cases in which it has been held, where carriers received goods and gave receipt therefor which specified that they were received to be sent to a point beyond their line, and there delivered to the consignee, that the contract was one for transportation the whole distance, upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands: Muschamp v. Lancaster R. R. Co., 8 M. and W., 421; Collins v. Bristol & Exeter R. R. Co.,

11 Exch., 790; same case in House of Lords, 5 H. & N., 969. The same ruling has been made in this country, where the carrier had expressly agreed to carry to a point beyond his line, for a compensation specified: Wilcox v. Parmalee, 3 Sandf., 610; Mallory v. Burrett, 1 E. L. Smith, 234; Noyes v. R. & B. R. R. Co., 27 Vt., 110. But the doctrine generally accepted by the American courts is, that where a carrier receives goods marked for a particular designation beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line and forward from its terminus: Ackley v. Kellogg, 8 Cow., 223; Van Santvoord v. St. John, 6 Hill, 157; Hood v. N. Y. & N. H. R. R. Co., 22 Conn., 1; Elmore v. Naugatuck R. R. Co., 23 Conn., 457; F. & M. Bank v. Champlain Trans. Co., 23 Vt., 209; Brintnall v. Saratoga R. R. Co., 32 Id., 665; Nutting v. Connecticut River R. R. Co., 1 Gray, 502; Briggs v. Boston & Lowell R. R. Co., 6 Allen, 246; Perkins v. Portland & Saco R. R. Co., 47 Me., 573; American note to 11 Exch., 797. And see Angle v. Miss. & Mo. R. R. Co., 9 Iowa 487. In the case in 1 Gray, the defendants receipted the goods at a station on their line "for transportation to New York"—a point beyond their line. No connection in business was shown between them and any other railroad company. The defendants were accustomed to receive pay only over their own road. The goods in question were delivered to a connecting line, but only a portion of them reached New York. The defendants were held not liable, on the ground that their undertaking was to carry over their own road only. Whether the receipt of freight by them for the whole distance would have affected their liability may perhaps be an open question on the authorities. That circumstance has evidently been regarded as important in some cases. See Weed v. S. & S. R. R. Co., 19 Wend., 537, and Redf. on Railw., 286 and note; but in Hood v. N. Y. & N. H. R. R. Co., 22 Conn., 1, the first carriers, who received payment for transportation over the connecting line, were regarded as having received it as agent only, and not as compensation for an undertaking by themselves to transport over such line.

In the present case it is not shown that any connection in business exists between the defendants and the Cincinnati, Hamilton & Dayton Railroad Company. It is admitted that the lat-

ter company "is one of those forming a transportation route from Cincinnati, to the city of Detroit"—but this would be true whether the companies had business connections or not. It does not appear that the freight was paid and the contrary is inferable. It does not even appear that the charges agreed upon were for the whole route; and if they were, the case, I think, would not be affected by that circumstance. The only consequence would be to make the whole freight payable to the defendants who would deduct their own charges and pay over to the Ohio company what remained. Fixing upon the price would only amount to an agreement by the Ohio company that the whole charges should not exceed that sum. In the absence of agreement between the two companies on the subject, the defendants would not be compelled to conform their own rates to those agreed upon at Cincinnati.

On this record, as it stands, I think we must hold that the bills of lading given at Cincinnati were fully complied with when the Cincinnati, Hamilton & Dayton company had carried the goods to Toledo and there delivered them to the defendants. If there is any exception to this statement, it must relate to the rates of freight; but even as to those, the undertaking of the Ohio company would not bind the defendants unless authority to bind them was shown. As there is no evidence on that point, I think the defendants received the goods at Toledo to be carried to Detroit under their liability as carriers at the common law, and with the right to make such reasonable charges as their regulations may have prescribed. If reasonable charges over their own line would exceed the amount specified—and which would appear by the waybill—they might refuse to receive the goods except upon prepayment; but if they received and carried them with a notification that certain rates only were to be charged for the whole transportation, they would doubtless be limited in their collection to that sum. But one company cannot possess power, arbitrarily and in the absence of consent, to fix the rates for transportation by another, on the ground solely that the two form a continuous line between two points. It must be equally without power to make contracts diminishing the common-law liability of the other; inasmuch as all such contracts must be based upon a consideration, which only the party himself or his agent duly authorized is competent to agree

upon. If the bills of lading in terms applied to the carriage for the whole distance, we should be required to hold, I think, that the defendants adopted their terms and consented to be bound by them when they received and carried the goods under them; but I have already said that such is not the case in respect to the particular bills now under consideration.

I think, therefore, that the defendants should be held liable for the wine, candles and tobacco shipped from Cincinnati, unless the plaintiffs had been duly notified of their receipt at Detroit, and had had reasonable time after notice to remove them before the fire had occurred. It is admitted that no notice was given of the receipt of the wine and candles, but of the arrival of the tobacco the plaintiffs were notified about half-past 3 o'clock in the afternoon of the 26th of April. The defendants were in the habit of closing their depot at 6 P. M. The fire occurred on the same evening. I am of opinion that a reasonable time was not afforded for the removal after the notice. It might not be proper to attempt to lay down any general rule as to what shall constitute reasonable notice in these cases, where the record discloses so little which bears upon the point; but it seems quite clear to my mind that two hours and a half are not sufficient, especially in view of the notice which defendants give to consignees—that they will charge for storage after twenty-four hours—which may possibly have led to a general impression that the relation of warehousemen was not to be considered as established until the expiration of that time. I think, therefore, the plaintiffs should have judgment for the value of the tobacco also. For the eggs delivered to the defendants at Adrian and Hudson, under an exemption from liability for losses in consequence of fire in the depot, the defendants cannot be held liable under the principles hereinbefore stated.[1]

CHRISTIANCY, J., concurred.

CAMPBELL, J. I concur entirely in the views of my brother Cooley upon the validity and effect of the several bills of lading,

[1] Walters v. Detroit U. Ry. Co., 139 Mich. 303 (1905).

Obligations of public service companies to make connections.—22 Harv. L. Rev. 564-578.

When a carrier becomes a warehouseman.—18 Harv. L. Rev. 145; 23 Harv. L. Rev. 307, 481.

Notice when consignee lives at place of delivery.—Pinney v. First Div. St. Paul, etc., Co., 19 Minn. 251; 67 L. R. A. 274; 6 Cyc. 457-9.

and also upon the question of freedom from responsibility for the fire.

But regarding the company as warehousemen in all the cases before us, I think all the judgments should be affirmed.

MARTIN, Ch. J., concurred.

McENTEE v. THE NEW JERSEY STEAMBOAT CO.,

45 N. Y. 34.

(1871)

The action was brought against the defendants for the conversion of chattels claimed by the plaintiff. The defendants, as common carriers between Albany and New York, received from Mr. Guyer, at Albany, and carried to New York, in 1868, several bundles of sash and blinds addressed to "McEntee," New York. After these arrived at New York, the plaintiff claimed them and gave evidence tending to prove that he demanded the goods and tendered the charges, and that the agents of the defendants refused to deliver them.

The defendants gave evidence that they offered to deliver them to the cartman of the plaintiff and to the plaintiff upon the production of any paper showing ownership or authority to receive them, and that the defendants were at all times ready to deliver the goods to the plaintiff upon the production of any reasonable evidence identifying him as the consignee and owner. The judge ruled and decided that the only question for the jury was whether the freight money was tendered, and restricted the counsel in summing up to that question only, and charged the jury, 1st. That when the defendants receive goods, the consignor putting them on a steamboat to be carried to New York without consigning them to any particular individual, the steamboat company was authorized to deliver them to any person who calls for them; and, 2d. That common carriers have no right to insist on any person proving ownership, for they are not restricted as to the delivery, and incur no liability whatever in that respect.

A verdict was rendered at the King's Circuit in favor of the plaintiff for the value of the property, upon which judgment was entered and affirmed on appeal by the Supreme Court, and from

the latter judgment the defendants have appealed to this court.

ALLEN, J. The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but if the refusal was qualified, the question was whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. (Alexander v. Southey, 5 B. and Ald., 247; Holbrook v. Wright, 24 W. R., 169; Rogers v. Weir, 34 N. Y. 463; Mount v. Derick, 5 Hill, 455.) If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. (Hawkins v. Hoffman, 6 Hill, 586; Powell v. Myers, 26 Wend. R. 290; Devereux v. Barclay, 2 B. and Ald. 702; Guillaume v. Hamburgh and Am. Packet Co., 3 Hand; 42 N. Y. 212; Duff v. Budd, 3 Brod. and Bing. 177.) The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it

should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.

WITBECK v. HOLLAND, 45 N. Y. 13.

(1871)

Appeal from the judgment of the General Term of the Supreme Court in the fourth judicial district, affirming the judgment for the plaintiff, entered upon the report of the referee.

This action was tried before a referee, who found that the American Express Company was a joint stock association engaged in the general express business. That the plaintiff was a soldier on Hart's Island, N. Y., who, having received his bounty money on the 3d of December, 1864, took $320 of it to the office of Adams Express Company, on that island, where it was counted, put in an envelope, sealed and addressed to "Martin Witbeck, Schenectady, N. Y.," delivered to the agent of the company, who gave the plaintiff a receipt acknowledging the receipt of the package. * * *

The package was delivered by the Adams Express Company on the 5th of December, 1864, to the American Express Company at its office in New York, and a receipt was given to the Adams Express Company. * * *

The American Express Company delivered the package at Schenectady, December 6th, 1864. Martin Witbeck, a consignee of said package, resided with his wife at Schenectady, at the time of the arrival of the package at Schenectady, and until after January 14, following.

The agent of the American Express Company did not know Martin Witbeck, and, when the package arrived, looked at the

directory and did not find his name in it. The next day the agent filled up a notice and addressed it to Martin Whitbeck, Schenectady, and deposited it in the post office. Between one and three days thereafter, the agent inquired of two men, conductors upon the N. Y. Central Railroad, running from Schenectady to Troy, and also inquired of John Bradt, the city treasurer of Schenectady, whether they knew Martin Whitbeck, and they replied they did not.

The agent made no further effort to find the consignee, and the package was deposited in the company's iron safe in its office till January 17, 1865, when the office was burglariously opened in the night, the safe blown open, the package abstracted and stolen and has never been recovered.

The notice put in the post office was not received by Martin Witbeck, though inquiries were made several times at the post office while it was there, by his wife and father, for letters for themselves and for him.

The referee decided, among other things, that the American Express Company was bound to deliver the package to Martin Witbeck, personally, or at his residence or place of business; that the American Express Company did not make due effort to find Martin Witbeck, or his residence or place of business; that the plaintiff was entitled to judgment for $320, with interest from December 7, 1864.

From the judgment entered upon the report the defendant appealed to the General Term, where it was affirmed, and from such judgment of affirmance this appeal was taken.

GROVER, J. The facts found by the referee showed beyond question that the defendant was a common carrier, and responsible, as such, for property delivered to it for transportation. This finding was warranted by the evidence. It was engaged in transacting a general express business. It is insisted by the counsel for the defendant that its liability was restricted by the contract, proved by the receipt given by the Adams Express Company to the plaintiff, upon the receipt of the money from him by it at Hart's Island. From this receipt, it appears that the latter company undertook to forward the package to its agent nearest to its destination, there to deliver it to other parties to complete the transportation, such delivery to terminate all liability of that company for its passage. There is nothing in this or any other

restriction at all affecting the liability of the defendant as a common carrier; all the restrictions found in the receipt are by the language limited to the liability of the Adams company. Indeed, were they applicable to the defendant, they would not affect the liability of the defendant in the action, as they do not include the cause of the loss, unless they relieve the carrier from the duty of delivery to the consignee. The first inquiry is, whether it was the duty of the carrier so to deliver the package in the absence of any restriction. Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. (2 Kent's Com., 605; Angell on Carriers, § 295; Gibson v. Culver, 17 Wend. 305; Fisk v. Newton, 1 Den. 45.) But when goods are safely conveyed to the place of destination, and the consignee cannot, after reasonable effort, be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. (Fisk v. Newton, supra.) Carriers by vessels, boats and railways are exempt from the duty of personal delivery. (Redfield on Railways, § 127; Thomas v. Boston R. R. Co., 10 Metcalf, 472.) Such carriers discharge themselves from responsibility, as such, by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies, although availing themselves of carriage by rail. (Redfield on Railways, § 127.) These were established for the purpose of extending to the public the advantage of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.

It appeared in the present case that the defendant had its vehicles by which they carried articles to the consignees in the city of Schenectady, which had arrived there by rail under contracts with the company for the transportation. This is the usual course of transacting business by such companies; were it otherwise, the business done by these companies would be greatly diminished, as it would be equally advantageous in many cases to have the property transported by the railroad company. When the defendant received the package from the Adams Company

at New York, consigned to Martin Witbeck, Schenectady, it became liable as carrier for its carriage to Schenectady and its delivery to Witbeck there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady would have been incurred. The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant, that the question, what is reasonable diligence, is one of law. That may be so, when there is no conflict in the evidence, or controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the questions will be mixed, both of fact and law. In the present case the finding of the referee was clearly correct. The diligence, which the law required of the defendant, was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so unattentive as to mistake the surname of the consignee. Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made delivery would have been made and the loss would never have occurred. There is nothing in the point that the negligence of the plaintiff in not giving further information as to the residence of the consignee contributed to the loss. The defendant accepted the package, addressed as it was, and failed in the performance of the duty imposed thereby. For such failure it is responsible, irrespective of the right of the plaintiff to give additional information. I have examined the various exceptions taken by the appellant to the rulings of the referee as to the competency of evidence. The question whether the consignee was well known in Schenectady was proper. The

plaintiff had the right to prove this fact if he could. But the testimony given in answer was not material. None of the testimony excepted to could have prejudiced the defendant. The judgment appealed from must be affirmed.

All the judges concurring, judgment affirmed.

RAILROAD COMPANY v. MANUFACTURING CO.,

16 Wall. (U. S.) 318.

(1872)

In error to the Circuit Court for the District of Connecticut; the case being thus:

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick delivered to the agent of the Michigan Central Railroad Company, for transportation, a quantity of wool consigned to the Mineral Springs Manufacturing Company, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company. * * *

Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboats, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was, and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of the line of propellers to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee, nor the station-master at Jackson, were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire, not the result of any negligence on the company's part. During all the

time the wool was in the depot it was ready to be delivered for further transportation to the carrier upon the route indicated.

In consequence of the loss the manufacturing company sued the railroad company. * * *

The controversy, of course, was as to the nature of the bailment when the fire took place. If the railroad company were to be considered as warehousemen at the time the wool was burned, they were not liable in the action, as the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there were no circumstances connected with the transaction which lessened the rigor of the rule applicable to that employment, they were responsible; carriers being substantially insurers of the property entrusted to their care.

The court was asked by the railroad company to charge the jury that its liability was the limited one of a warehouseman, importing only ordinary care. The court refused so to charge, and, on the contrary, charged that the railroad company were liable for the wool as common carriers, during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business, under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in line, but that the manufacturing company took the risk of the next carrier in line not being ready and willing to take said wool, and submitted it to the jury to say whether under all the circumstances of the case in evidence before them, such reasonable time had elapsed before the occurrence of the fire.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error was prosecuted to reverse that decision.

Mr. Justice Davis delivered the opinion of the court.

It is not necessary in the state of this record to go into the general subject of the duty of carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different juries of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the prop-

erty is in process of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the propeller company. Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellers, with

their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defense, this limited ability of the propeller line when the officers of the road knew of it at the time the contract of carriage was entered into, and the other party to the contract had no information on the subject?

It is said, in reply to this objection, that the company could not have refused to receive the wool, having ample means of carriage, although it knew the line beyond Detroit selected by the shipper was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favor, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so when, as in this case, there were other lines of transportation from Detroit eastward by which the wool, without delay, could have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit, to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that at least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery, and cannot, therefore, complain of the response of the jury to the inquiry on this subject submitted to them by the Circuit Court.

It is earnestly argued that the plaintiffs in error are relieved

from liability under a provision contained in one section of their charter, if not by the rules of the common law.

But it is quite clear, on reading the whole section, that it refers to property which has reached its final destination, and is there awaiting delivery to its owner. If so, how can the proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge, rather than limit, the operation of it. This it cannot do, unless words are used which leave no doubt the legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage. That in both cases, as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter, to be awaiting transportation. And this distinction is recognized by the Supreme Court of Michigan in the case of the present plaintiffs in error against Hale. The court in speaking on this subject say, "that goods are on deposit in the depots of the company either awaiting transportation or awaiting delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a recent decision of the Court of Appeals of New York, in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharges them. The position is, that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendants in error.

This notice is general, and not confined, as in the section of the charter we have considered, to goods on deposit in the depots of the company awaiting delivery. It is a distinct announcement that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company. The notice was, doubtless, intended to secure immunity for all losses not caused by negligence or misconduct during the time the property remained in the depots of the company, whether for transportation on their own line, or beyond, or for delivery to consignees. And such will be its effect if the party taking the receipt for his property is concluded by it. The question is, therefore, presented for decision whether such a notice is effectual to accomplish the purpose for which it was issued.

Whether a carrier when charged upon his common-law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of The New Jersey Steam Navigation Company v. The Merchants' Bank, and York Company v. Central Railroad. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case the effect of a general notice by the carrier seeking to extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much-controverted subject.

In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: "It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may, or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged

from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

These considerations against the relaxation of the common-law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right

to impose them, would, in our opinion, work great harm to the business community.

The weight of authority is against the validity of the kind of notices we have been considering. And many of the courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions. Still they have been continued, and this persistence has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their existence. By an act of the legislature passed after the loss in this case occurred, it is declared "that no railroad company shall be permitted to change or limit its common-law liability as a common carrier by any contract or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried."

It is fair to infer that this kind of legislation will not be confined to Michigan, if carriers continue to claim exemption from common-law liability through the medium of notices like the one presented in defense of this suit.

Judgment affirmed.

THE L. L. & G. RAILROAD CO. v. MARIS, 16 Kan. 333.

(1876)

Maris, as plaintiff, recovered judgment at the April Term, 1874, of the district court against the Railroad Company, for $208.25, and costs, and the Railroad Company brings the case here on error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error to recover for goods destroyed by fire in a depot belonging to the plaintiff in error, and the question is, whether the company at the time of the fire occupied toward the goods the position of carrier, or that of warehouseman. The case was tried upon an agreed statement of facts. It is not contended that the fire was caused by the negligence of the company, or that if its liability as carrier had terminated it was responsible for the loss. The material facts are these: Maris was a merchant at Winfield, a place about ninety miles west of Independence, a point on the company's road. Goods were shipped to him over

the company's road, to be delivered to him at Independence. The goods in question reached Independence on the 4th and 7th days of January, 1872, and were placed in the depot building, and there remained eight days, (until the 15th of January,) and were then consumed by fire. Immediately after the arrival of each consignment of goods at Independence, notice thereof was forwarded by mail to Maris at Winfield, but did not reach him until the 20th of January, and after the fire. A tri-weekly mail ran between the two places. Ordinarily, only two days were occupied in transmitting the mail. During that month the epizooty was prevailing among the horses in that section of the country, and owing to that or some other cause over which neither party had any control, the notice did not reach Maris until the 20th. He called every day at the post office in Winfield for his mail. The only means of conveying goods from Independence to Winfield was by wagon, and under favorable circumstances the trip from Winfield to Independence took from three to five days, and the round trip six to ten days. By special agreement between the parties, notice was to be given Maris by mail of the arrival of the goods at Independence. The form of the notice given, (and Maris had prior to the 1st of January, 1872, received similar notices of the arrival of other goods,) was as follows:

Exhibit A.

Freight Office, L. L. & G. R. R. Line.

Independence, ——, 187—.

M————————:

There this day arrived at our depot at ————, consigned to you, the following articles:

No.	Articles.	No.	Articles.

Weight. ———— Charges, $————

which are ready for delivery to you on payment of freight and charges.

N. B.—No goods delivered until all the charges thereon are paid. Storage will be charged in all cases where goods are not removed within the prescribed time.

The contract of this company as common carriers ends upon the arrival of goods at our depots, and the company will not be responsible for damage from ordinary leakage, breakage, or insufficient cooperage; and no claims for damages will be allowed after the goods leave the depot, unless by consent of the agent.

Goods will be delivered only to the owner, or his written order. A receipt for the goods will, in all cases, be required, and no claim will be entertained for goods lost after such receipt has been taken.

————————, Agent.

Upon these facts some questions of importance are presented. It is insisted on behalf of the company, in the first place, "that a common carrier is relieved of its extraordinary liability as an insurer whenever it has carried the goods entrusted to it safely, and deposited them in a safe warehouse." This question as to the period at which the carrier's extraordinary liability terminates, comes to us borne upon two opposing lines of decision. At the head of one line stands the case of the Norway Plains Company v. B. &. M. Rld. Co., 1 Gray, 263, in which the great jurist of Massachusetts, C. J. Shaw, holds that this liability of the carrier terminates when the goods are unloaded at their place of destination, and are ready for removal by the consignee; that if the latter be not present to receive them, and they are kept by the company in its depot or warehouse, its liability is that of a warehouseman. In other words, this liability continues only during the actual transit, and that when this is ended, if the consignee does not immediately receive them the company, as carrier, delivers them to the company as warehouseman, and thereafter the company is liable only for loss resulting from actual negligence. At the head of the other line is the case of Moses v. B. & M. Rly. Co., 32 New Hamp. 523, in which the court decides that the carrier's liability continues after the termination of the actual transit, and until the consignee has a reasonable time to remove the goods; that, as the carrier's liability commences, not with the actual transit of the goods, but from the time of receipt from the consignor, so it continues until actual delivery to the consignee, or, what is equivalent to a delivery, until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business. The mere fact that either before or after the actual transit they are placed by the company in its depot or warehouse does not change the character of its liability. The following cases support the Massachusetts doctrine: McCarty v. N. Y. & Erie Rld. Co., 30 Penn. St. 253; Francis v. Dubuque & S. C. Rld. Co., 25 Iowa, 60; Bauserman v. T. W. & W. Rly. Co., 25 Ind. 434; C. & C.

Air Line Rld. Co. v. McCool, 26 Ind. 140; C. & A. Rld. Co. v. Scott, 42 Ill. 133. The other doctrine is adopted in the following cases: Fenner v. B. & St. L. Rld. Co., 44 N. Y. 505; Zum v. New Jersey St. Co., 49 N. Y., 442; Wood v. Crocker, 18 Wis. 345; Derosia v. St. P. & W. Rld. Co., 18 Minn. 133; Morris & Essex Rld. Co. v. Ayres, 5 Dutch, 393; Blumenthall v. Brainard, 38 Vt. 413; McMillan v. M. S. & N. I. Rld. Co., 16 Mich. 79; Jeffersonville Rld. Co. v. Cleveland, 2 Bush. 468; Hilliard v. Wilmington & C. Rld. Co., 6 Jones, (Law) 343. The question is a new one in this state, and one of no small importance both to carriers and shippers. Notwithstanding there is a technical precision in the Massachusetts doctrine which makes it both capable of exact statement and easy of application, we think the other doctrine more just and reasonable in its application to the ordinary transactions of business, protecting both the shipper and the carrier. It extends a little the duration of the carrier's obligation, but only so far as seems necessary to protect the shipper. The goods remain in the custody of the carrier, and subject to his control. The exact moment of arrival can seldom be known to the consignee, even if he have notice of the shipment. It is unreasonable to compel him to remain at the depot of the carrier, waiting the arrival of the goods, or assume all the risks of the uncertainties in the delay of transportation and time of arrival. We therefore hold that the carrier's liability continues until the consignee had had a reasonable time to call for, examine, and remove the goods.

What is a reasonable time? This is not a time varying with the distance, convenience or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods. It is well said by the court in the case from 18 Minn. 133, that, "What would be under the circumstances of the case, such reasonable time for the removal of the goods, is not to be measured by any peculiar circumstances in the condition or situation of the consignee, or plaintiff, which render it necessary for his convenience or accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with means and facilities of removing them; but what is meant by reasonable time is, such as would give a

person residing in the vicinity of the place of delivery, informed of the usual course of business on the part of the company, a suitable opportunity, within the usual business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods, and take them away." Tried by this rule, it is plain that the goods had remained in the depot at Independence more than a reasonable time for their inspection and removal. They should have been removed on the day of their arrival, or at the furtherest, during the business hours of the succeeding day.

It is insisted, however, that notice was required of their arrival, and that no notice was received until after the destruction. Whether, independent of the special contract, any notice was requisite, may be doubted. The consignee did not live at or near the place of delivery, and the authorities are conflicting upon the question whether notice is requisite even when the consignee lives at the place of delivery. See upon the question of notice McDonald v. W. Rld. Co., 34 N. Y. 497; Fenner v. Buffalo & St. L. Rld. Co., 44 N. Y. 505; Price v. Powell, 3 N. Y. 322; C. & A. Rld. Co. v. Scott, 42 Ill. 133; Derosia v. St. P. & W. Rld. Co., 18 Minn. 133; McMillan v. M. S. & N. I. Rld. Co., 16 Mich. 79; Hilliard v. W. & C. Rld. Co., 6 Jones, (Law) 343. But whether notice independent of any special contract would have been requisite, need not be determined, for here the parties had stipulated for notice. And the question is, what effect did this notice have upon the company's liability? On the one hand it is claimed that the reasonable time in which to remove the goods dates from the receipt of the notice, instead of the arrival of the goods; on the other, that the notice was purely a favor to the consignee, and that specifying the time at which the carrier's liability was to cease, it cannot be construed as enlarging that time. The question is one of difficulty. In those states where notice of the arrival of the goods is required to terminate the carrier's liability, it is held that the reasonable time for removal dates from the giving of the notice. This seems necessary to make the notice of any value, for if the reasonable time commences with the arrival of the goods it might often expire before the receipt of notice. It would almost invariably so expire if the consignee lived elsewhere than at the place of delivery. Hence, the notice would be meaningless, as affecting the rights

and liabilities of either party. On the other hand, the form of notice used by the company, and of which Maris had information by the receipt of such notices, attempts to limit the effect thereof, and plainly states that the company's liability as carrier is to terminate upon the arrival of the goods. Hence, Maris had knowledge that while the company had agreed to give and would give notice of the arrival, it did so only as a favor to him, and without extending the duration of its extraordinary liability. If Maris was unwilling to continue the shipment of goods under such conditions he was at liberty to stop. Continuing, he accepts the conditions. To this it is replied that, contracting for notice without any stipulations as to the forms and conditions of notice, carries with it all the rights which flow from the mere fact of notice, and that the company cannot thereafter limit those rights by attaching conditions to that notice. This would doubtless be a satisfactory reply if this were the first consignment and the first notice. But having received notices with similar conditions, and making no objection thereto, or seeking a new arrangement, it seems to us that he cannot insist upon rights other than those given by the form of notice actually used. It must be borne in mind that this is not an attempt by the company to restrict its liability, but an attempt by special contract to enlarge it; and before the company could be bound by such special contract it should be made clear that it had assented to it in full as claimed. It is not pretended that the company had ever given any notice otherwise than with the conditions attached to this; nor is it claimed the company would not be liable for any injuries resulting from its own negligence; so that its interpretation of its contract for notice, an interpretation accepted by Maris without objection, was that of an agreement to give information of the arrival of the goods without in the meantime assuming any additional liability. We are aware that the agreed statement shows that the first notice was only received Dec. 23, 1871, and that owing to the sickness of one party employed, as well as the prevalence of the epizooty, Maris failed to get a team to Independence before the destruction of all the goods of the various consignments by fire on January 15th, 1872. But we fail to see anything which shows that Maris was unable to communicate by mail with the company, or to go himself, or send some one else

to Independence to make a new arrangement, or stop the shipment, or receive and store the goods. Under these facts, though with some doubts, we are constrained to hold that the company's liability as carrier had terminated before the fire, and that therefore it was not responsible for the destruction of the goods.

The case having been tried upon an agreed statement of facts, the judgment will be reversed, and the case remanded with instructions to enter judgment in favor of the plaintiff in error, defendant below.

All the justices concurring.[1]

[1] Withdrawal from public employment.—16 Harv. L. Rev. 49, 143, 542; 22 Harv. L. Rev. 369.

CHAPTER X.

COMMON CARRIERS OF PASSENGERS

1. Creation of Relation.

BRIEN v. BENNETT, 8 Car. & P. 724.

(1839)

Case.—The declaration stated that the defendant was the proprietor of an omnibus for carrying passengers from Hammersmith and divers other places to London, and being such owner, the plaintiff at the request of the defendant, "agreed to become and became a passenger by the said omnibus to be safely and securely conveyed" from Hammersmith to London for reasonable fare and reward to the defendant, "and the defendant then received the plaintiff as such passenger as aforesaid, and thereupon it became and was the duty of the defendant to use due and proper care that the plaintiff should be safely and securely carried and conveyed by the said omnibus," yet the defendant, not regarding his duty, did not use proper care, &c., but on the contrary neglected it, so that by the negligence of the defendant and his servant in that behalf, "the plaintiff, whilst such passenger as aforesaid," fell from the said omnibus upon the ground, and was greatly hurt, &c. Pleas, 1st, not guilty; 2nd, denying that the defendant was the proprietor of the omnibus; 3rd, "that the plaintiff did not become a passenger by the said omnibus, nor did the defendant receive him the plaintiff as such passenger in manner and form as in the said declaration is alleged," (concluding to the country.)

It appeared that the defendant's omnibus was passing on its journey, when the plaintiff who was a gentleman considerably advanced in years, held up his finger to cause the driver of the omnibus to stop and take him up, and upon his doing so the driver pulled up, and the conductor opened the omnibus door;

and that just as the plaintiff was putting his foot on the step of the omnibus, the driver, supposing that plaintiff had got into it, drove on, and the plaintiff fell on his face on the ground, and was much hurt.

LORD ABINGER, C. B. I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger, and that it is evidence to go to the jury.

Verdict for the plaintiff—Damages 5£.

GILSHANNON v. THE STONY BROOK R. COR., 10 Cush. (Mass.) 228.

(1852)

Action on the case for injuries sustained by the plaintiff, a laborer in the employment of the defendants, by the negligence of their servants and agents. It was tried in this court before Bigelow, J., by whom the evidence was reported for the consideration of the whole court. From this evidence it appeared that the plaintiff was a common laborer, employed in repairing the defendants' road-bed, at a place several miles from his residence. Each morning and evening, he rode with other laborers, to and from the place of labor on the gravel train of the defendants. This was done with the consent of the company, and for mutual convenience; no compensation being paid, directly or indirectly by the laborers, for the passage, and the company being under no contract to convey the laborers to and from their work.

While thus on the way to their work on one occasion, a collision took place with a hand car on the track, through the negligence of those having charge of the gravel train, as the plaintiff contended, and he was thrown off and run over by the gravel train, for which injury this action was brought. The plaintiff had no charge or care over the gravel train, and there was some evidence that the gravel train was not sufficiently supplied with brakemen. If upon these facts the jury would be justified in finding a verdict for the plaintiff the case was to stand for trial; otherwise the plaintiff to become nonsuit.

DEWEY, J. If the relation existing between these parties was that of master and servant, no action will lie against the defendants for an injury received by the plaintiff in the course of that service, occasioned by the negligence of a fellow servant. Farwell v. Boston and Worcester Railroad, 4 Met. 49; Hayes v. Western Railroad, 3 Cush. 270.

It was attempted on the argument for the plaintiff to take the case out of the rule stated in those cases, upon the ground that the nature of the employment of these servants was different, the plaintiff being employed as a laborer in constructing the railroad bed, and not engaged in any duty connected with running the trains, and so not engaged in any common enterprise. The case of Albro v. Agawan Canal Co. 6 Cush. 75, seems to be adverse to these views, and goes strongly to sustain the defense.

It was also urged that the plaintiff was not in the employment of the defendants at the time the injury was received, or that he might properly be considered as a passenger, and the defendants, as respects him, were carriers for hire. But as it seems to us, in no view of the case can this action be maintained. If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action.

How does the case differ from that suggested at the argument by the counsel for the defendants, who supposed a case where the business for which the party is employed, is that of cutting timber, or standing wood, and the servant receives an injury in his person on the way to the timber lot, by the overturning of the vehicle in which he is carried, by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case.

It[1] seems to the court, that upon the evidence offered in the present case, the plaintiff was not entitled to a verdict, and the nonsuit should stand.

Plaintiff nonsuit.[1]

SHOEMAKER ET AL. v. KINGSBURY, 12 Wall. (U. S.) 369.

(1870)

Error to the Circuit Court for the District of Kansas.

Suit for damages for personal injuries happening on a rail car.

Verdict and judgment having gone for the plaintiff, the defendants brought the case here on error.

Mr. JUSTICE FIELD delivered the opinion of the court.

From the whole evidence in this case it is plain that the defendants were not common carriers of passengers at the time the accident occurred, which has led to the present action. They were merely contractors for building the Eastern Division of the Union Pacific Railway, and were running a construction train to transport material for the road. The entire train consisted, besides the engine and its tender, of cars for such material and what is called in the testimony a "caboose car." This latter car was intended solely for the accommodation of the men connected with the train; it contained their bunks and mattresses; they slept in it, and deposited in it the lamps of the cars, and the tools they used. It was not adapted for passengers, and, according to the testimony of the conductor, the defendants did not wish to carry passengers, although when persons got on to ride the defendants did not put them off, and sometimes, though not always, fare was charged for their carriage.

The plaintiff, who was sheriff of a county in Kansas, and deputy marshal of the district, desired to arrest a person on the line of the road, and, to enable him to accomplish this purpose, he applied to the conductor for passage on the train as far as Wilson's Creek, and requested that the train would stop there until the arrest could be made. His wishes were granted in both respects, and for the services rendered he paid at the time a portion of the fare charged, and the balance subsequently.

[1] Doyle v. Fitchburg Ry., 162 Mass. 66; Moore on Carriers, 586-7.

In the rendition of these services for the plaintiff, the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travelers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable.

They are also bound to provide careful and skillful servants, competent in every respect for the positions to which they are assigned in the management and running of the cars; and they are responsible for the consequences of any negligence or want of skill on the part of such servants.

They are also bound to take all necessary precautions to keep obstructions from the track of the road; and, although it may not be obligatory upon them, in the absence of legislative enactment, to fence in the road so as to exclude cattle, it is incumbent upon them to use all practical means to prevent the possibility of obstruction from the straying of cattle onto the track as well as from any other cause. As said by the Supreme Court of Pennsylvania, in speaking of the duty of railway companies in this particular: "Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of a passenger any more than a defective rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe, or fence, or place cattle-guards within the bed of their road, or by any other contrivance exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues."

It is evident that defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it beyond its construction. It was no part of their duty to fence it in or to cut away the bushes or weeds growing on its sides.

The plaintiff knew its condition and the relation of the defendants to it when he applied for passage. He had been previously over it several times, and was well aware that there were no turntables on a portion of the route; a fact, which compelled the defendants to reverse the engine on the return of the train from Wilson's Creek. He, therefore, took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them, under these circumstances, was the exercise of such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train. If such care and skill were used by the defendants, they discharged their entire duty to the plaintiff, and if an accident, notwithstanding, occurred, by which he was injured, they were not liable. They were not insurers of his safety, nor responsible for the consequences of unavoidable accident.

The question should have been put to the jury whether the defendants did in fact exercise such care and skill in the management and running of the train at the time the accident occurred. They were not responsible to the plaintiff, unless the accident was directly attributable to their negligence or unskillfulness in that particular.

The evidence in the case shows that the accident was occasioned by the tender and engine running against a steer. The train was proceeding at its usual rate of speed when the steer suddenly, from a mass of high weeds or grass growing on the

sides of the road, leaped upon the track directly in front of the advancing train, at a distance from it of about twenty feet. This distance was so short, and the movement of the animal was so sudden, that it was impossible to arrest the train and a collision followed which threw the engine and tender from the track. The plaintiff, on the happening of the collision, either leaped from the "caboose car," in which he was at the time sitting, or was thrown from it, it is immaterial which, and was injured.

The fifth instruction given by the court turned the attention of the jury from the simple question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident. * * * And it made the occurrence of the accident presumptive evidence that they were destitute of such skill, habits, and qualifications.

We are of opinion that the court erred in this instruction, and that it misled the jury. On this ground the judgment of the court below must be reversed and the cause remanded for a new trial.

WILTON v. MIDDLESEX RAILROAD CO., 107 Mass. 108.

(1871)

Tort against a street railroad corporation for personal injuries alleged to have been received by the plaintiff through the negligence of the driver of one of the defendant's horse-cars.

At the trial in this court, the plaintiff offered to prove "that on July 16, 1868, at which time she was nine years of age, she went out about seven o'clock in the evening to walk; that she was in company with four or five other girls, on the Charlestown bridge, and near the draw, and one of the defendants' cars came along very slowly; that there were no passengers on the platform, and the driver beckoned to the girls to get on, and they accordingly got on the platform, while the car was going slowly; that the driver then struck his horses, and they started on a fast trot; that the plaintiff had one foot on the step, and by reason of the sudden start lost her balance; that she called

to the driver to stop, but the car kept on, and she fell so that one of the wheels passed over her arm, and she was obliged to have it amputated; and that she used due care and the driver was careless." Upon the plaintiff's offer of proof, the case was reserved by the chief justice for the consideration of the full court; if the plaintiff was entitled to recover thereon, the case to stand for trial; otherwise, judgment to be given for the defendants.

MORTON, J. The plaintiff was injured while riding upon one of the defendants' cars. At the trial, she offered to prove that she was in the exercise of due care, and that the driver of the car was careless. For the purposes of this hearing, therefore, we are to assume that she was injured by the negligence of a servant of the defendants, in the course of his employment; and that her own want of care did not contribute to the injury. It follows, that she can maintain this action; unless we sustain the position taken by the defendants, that she was unlawfully upon the car, and therefore not entitled to recover.

The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge about seven o'clock in an evening in July. One of the defendants' cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver.

Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

A master is bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master. Ramsden v. Boston & Albany Railroad Co., 104 Mass. 117, and cases cited. The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his

instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

It follows, that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover, if she proves that she was using due care at the time of the injury and that she was injured by the negligence of the driver. Philadelphia & Reading Railroad Co. v. Derby, 14 How. 468, 483.

In the present aspect of the case, we are not called upon to consider to what extent the defendants might be held liable if it were shown that the plaintiff was unlawfully riding upon the car.

Case to stand for trial.

HOAR v. MAINE CENTRAL R. CO., 70 Me. 65.

(1879)

At the first term the defendant filed a separate demurrer to each count in the declaration, which was joined, both parties reserving the right of amendment. Thereupon the parties agreed to submit the case to the law court for their determination of the sufficiency of each count.

APPLETON, C. J. The material and substantive allegations in the several counts in the plaintiff's writ are that the defendants are common carriers of passengers between Waterville and West Waterville; that as such carriers they are bound to carry all passengers and persons lawfully on their road carefully and safely over the same; that the plaintiff's intestate, being invited by one Potter, a foreman of a section in their employ and entrusted by them with the care and control of one of their hand-cars, to ride with him on said hand-car from Waterville to West Waterville, accepted the invitation; that the plaintiff's intestate while riding was run over by one of the defendant's engines to which a paymaster's car was attached and injured so that he

died, and that this was through the negligence of the defendants and their servants, the deceased being in the exercise of due care.

To each count of the declaration the defendants filed a general demurrer.

I. The liability of a railroad company differs as to their duty to their servants and to passengers. They are liable to servants for injuries resulting from want of due care in the selection of fellow-servants, but if duly selected, they do not guaranty against their negligence. Blake v. M. C. R. R. Co., 70 Me. 60. Not so as to passengers, to whom they are responsible for injuries arising from their negligence or incapacity, irrespective of the question of more or less care in their selection. It is obvious that there is no defect in the declaration so far as it relates to the negligence of the defendants, if they are to be deemed common carriers by hand-cars.

II. The plaintiff's intestate was to be carried gratuitously. But that does not place him in a different position, so far as relates to his right to protection from neglect, from a pay passenger —if he is to be regarded as a passenger to be carried by the defendants. Phil. & Read. R. R. Co. v. Derby, 14 How. (U. S.) 468. Wilton v. Middlesex R. R. Co., 107 Mass. 108. Whar. Nge. § 355.

III. The plaintiff places her right to recover upon a neglect by the defendants of their duties to the intestate as common carriers. To impose upon the defendants the duties and responsibilities of common carriers, they must be shown to be such. The grave and important question, then, is whether the defendants, though common carriers of passengers along their road and in their cars for that purpose, are common carriers of passengers by the hand-cars used by their section men. Were the defendants chartered as common carriers save by their cars for passengers? Have they by their acts or conduct held out to the public, or authorized their agents to hold out to the public that they were common carriers by their hand-cars? If they have not been chartered, and have not in any way held themselves out as common carriers by hand-cars, then the duties and obligations resting upon them as carriers have not arisen.

If the defendants were common carriers in relation to the plaintiff's intestate, they would be bound to carry all who should

apply. Were, then, the defendants bound to carry on their hand-cars anyone asking to be so conveyed? Assuredly not.

In Graham v. Toronto, Grey & Bruce Railway Co., 23 Up. Can. (C. P.) 514, the defendants agreed, with a contractor for the construction of their railways, to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the defendants to provide the conductor, engineer and fireman; the contractor furnishing the brakemen. On October 31, 1872, after work was over for the day and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor but without the authority of the defendants, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. "The fact," remarks Hagarty, C. J., "that the defendant's engine-driver or conductor allowed him to get on the platform, does not alter my view of the case.

"I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent or without any objections from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such case be held to incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or person doing work at his house drive in his cart, make any difference. * * * It could never be, I think, in the reasonable expectation of these defendants that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character."

A similar question arose in Sherman v. Toronto, Grey & Bruce Railway Co., 34 Up. Can. (Q. B.) 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died, it was held that the deceased was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. "The workmen," observes Wilson, J., "were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting on their own risk,

not at the risk of the defendants, and however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest." In this case "it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and materials for track laying."

The defendants not being common carriers, so far as relates to their liability to the plaintiff's intestate, the declaration not disclosing facts which show such liability, must be adjudged bad. Eaton v. Delaware, L. & W. R. R. Co., 57 N. Y. 383; Union Pacific R. R. Co. v. Nichols, 8 Kan. 505. In Dunn v. Grand Trunk R. R. Co., 58 Maine, 187, the plaintiff was riding in a saloon car attached to a freight train, and paid the customary fare for conveyance in a passenger car.

IV. A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his hand-car has no right to impose upon the defendants the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe cariage, and every man may safely be presumed to know thus much.

If the risk is much greater by this mode of conveyance, the plaintiff's intestate by adopting it assumed the extra risks arising therefrom, and must be held to abide the unfortunate consequences.

No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance.

Declaration bad.

WAY v. CHICAGO, R. I. & P. R. CO., 64 Ia. 48; 19 N. W. 828.

(1884)

The plaintiff is the administrator of the estate of John Way, deceased. The action was brought by the decedent. After his death the present plaintiff was substituted. The plaintiff claims

to recover for a personal injury alleged to have been received by the decedent as a passenger on one of defendant's trains, and by being thrown against a cupola platform by defendant's negligence in making a coupling. There was a trial to a jury, and verdict and judgment rendered for the plaintiff. The defendant appeals.

ADAMS, J. In April, 1881, the decedent took passage upon a freight train at Monroe, Jasper county, for Oskaloosa. In payment of his fare he presented a mileage ticket which had been issued to one R. G. Forgrave, at commutation rates. The conductor of the train, without knowledge that Way was not Forgrave, detached the coupons for his passage. Printed upon the ticket were several conditions, and also a printed acceptance of the conditions, which was signed by Forgrave, and the whole was denominated a contract. One of the conditions is in these words: "This ticket is positively not transferable, and if presented by any other than the person whose name appears on the inside of the cover, and whose signature is attached below, it is forfeited to the company." The defendant's theory upon the trial below was that the decedent was not a passenger within the meaning of the law, and asked the court to instruct the jury accordingly. This the court refused to do, and gave an instruction in these words: "If you find from the evidence that the decedent was injured to the damage of his estate substantially as alleged, and that he was at that time riding in a caboose in the defendant's train on the mileage ticket in evidence, issued by the defendant to R. G. Forgrave, and that upon its presentation in payment for transportation the conductor of the train accepted the ticket, and recognized and treated the decedent as a passenger, the defendant's duties and obligations were, and its liabilities now are, the same as if the ticket had been issued to the decedent, whether, prior to the accident, he disclosed to or the conductor knew his identity or not." In respect to the measure of care which common carriers owe to passengers, the court gave an instruction as follows: "Common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accident to passengers. Not the utmost degree of care which the human mind is capable of inventing, but the highest degree of care and diligence which is

reasonably practicable under the circumstances, is what is required."

The giving of these instructions is assigned as error. The defendant insists that the contract relied upon as constituting the relation of common carrier and passenger was obtained by imposition and virtual misrepresentation, and it being now repudiated by the company, by a denial by it of its liability, the plaintiff cannot be allowed to set it up as binding upon the company; and that if the relation of common carrier and passenger did not exist, the company did not owe the decedent the measure of care set forth in the instruction. It appears to us that the defendant's position in this respect is well taken. When the decedent presented the ticket we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a right to travel upon it but Forgrave. By the presentation of the ticket the decedent falsely personated Forgrave with the intention of deceiving the company, and he did deceive it, and to its injury, for by reason of the deception he escaped the payment of the full rate with which he was otherwise chargeable. It is not material, then, that the decedent obtained the conductor's consent. Whether his consent would have bound the company if he had known that the decedent was not Forgrave, we need not require; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed be set up that relation against the company as a basis of recovery. He was, then, at the time of the injury, in the car without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of the company, fairly obtained. But no one would claim that a mere trespasser has such rights, and it appears to us to be well settled that consent obtained by fraud is equally unavailing.

The plaintiff insists that the extraordinary care described in the instruction does not become due from common carriers by reason of any contract, but simply by a rule of law which enforces the duty upon broader grounds. It is not important to inquire precisely how the duty arises. However it arises, the

duty is one which the common carrier owes only to passengers: and if, as we hold, the decedent did not sustain that relation within the meaning of the law, the company did not owe that duty to him, and that is the end of the inquiry. The doctrine which we announce was very clearly expressed in T., W. & W. R. Co. v. Beggs, 85 Ill. 80. In that case the court said: "Was defendant a passenger on that train in the true sense of that term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances the company could only be held liable for gross negligence which would amount to willful injury."

In Thomp. Carr. Pass. p. 43, § 3, the author goes even further. After stating the rule that the relation of carrier and passenger does not exist where one fraudulently obtains a free ride, he says: "This doctrine extends further, and includes the case of one who knowingly induces the conductor of a train to violate the regulations of the company, and disregard his obligations of fidelity to his employer."

In U. P. Ry. Co. v. Nichols, 8 Kan. 505, the defendant in error imposed himself upon the company as an express messenger, and obtained the consent of the conductor to carry him without fare. It was held that he did not become entitled to the rights of a passenger. The court, after quoting Shearman & Redfield's definition of a passenger, which is in these words: "A passenger is one who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, other than in the service of the carrier as such,"—proceeds to say: "The consent obtained from the conductor was the consent that an express messenger might ride without paying his fare. Such consent did not apply to the plaintiff," (the defendant in error.)

See also the following cases: T., W. & W. R. Co. v. Brooks, 81 Ill. 292; M. & C. R. Co. v. Chastine, 54 Miss. 503; Creed v. Pa. R. Co., 86 Pa. St. 139; Relf. v. Rupp, 3 Watts. & S. 21; Hays v. Wells, Fargo & Co. 23 Cal. 185. The plaintiff cites and relies upon Bissell v. Railroad Cos., 22 N. Y. 308; Washburn v. Nashville, etc., R. Co. 3 Head, 638; Jacobus v. St. Paul, etc., R. Co. 20 Minn. 125, (Gil. 110); Pa. R. Co. v. Brooks, 57 Pa. St. 346; Wilton v. Middlesex R. Co., 107 Mass. 108; Flint. etc., R. Co. v. Weir, 37 Mich. 111; Dunn v. Grand Trunk Ry. Co., 58

Me. 192; Edgerton v. N. Y., etc., R. Co., 39 N. Y. 227; Gregory v. Burlington, etc., R. Co., 10 Neb. 250; S. C., 4 N. W. Rep. 1025; Great Northern R. Co. v. Harrison, 10 Exch. 376. But none of these cases hold that the extraordinary care described in the instruction given is due to a person not a passenger, and none of them hold that the relation of passenger can be insisted upon where the company shows affirmatively as a defense that the company's consent was obtained by fraud.

Certain special objections to the defense remain to be noticed.

Section 2086 of the Code provides that "when by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid." The plaintiff cites this statute and claims, as we understand, that the mere possession of the ticket by the decedent was prima facie evidence of an assignment to him, and that the assignment, under the statute, was valid, and being such it is immaterial whether the conductor supposed that the decedent was Forgrave or not. Without undertaking to set forth all the answers which we think might be made to this position, we think it sufficient to say that we do not think that the word "instrument," as used in the statute, was designed to embrace railroad tickets like the one in question. The purpose of such a ticket is to serve as evidence of a contract to render the party to whom it is issued a personal service, to wit, the transportation of himself and baggage, and no one else, over the route described. The language is, "On presentation of this ticket, with coupons and contract attached, Mr. R. G. Forgrave may travel," etc. While section 2085 treats of instruments whereby the maker acknowledges labor to be due another, and while a valid assignment may undoubtedly be made of such instruments under the statute, we cannot properly so construe the statute as to hold that the essential nature of the contract can be changed so as to require the maker to do not only what he did not agree to do, but what the other party expressly stipulated that the maker should not be required to do. The case is not different from one where an individual or corporation should agree to transport certain specific freight and no other. No assignment could be made of the contract which would impose upon the maker the obligation to transport different freight. It is said by the company that Forgrave was a commercial traveler, and that the company was interested in facilitating commercial travelers and in

developing commerce along its line; but it is not important to inquire how this is. It is certain that we cannot go beyond the company's contract, so far as its essential nature is concerned.

Another statute relied upon is section 11, c. 77, Laws 1878. The section is in these words: "No railroad corporation shall charge, demand, or receive from any person, * * * for the transportation of persons, * * * or for any other service, a greater sum that it shall at the same time charge, demand or receive from any other person * * * for a like service from the same place, or upon like condition, and under similar circumstances." The plaintiff's position, as we understand it, is that the act of the company in commuting rates to Forgrave, though he might have belonged to a certain class, and though the company might have been interested in facilitating such class, was nevertheless a violation of law, and, being such, the acts of the decedent in gaining the advantage of the rates commuted to Forgrave, though done by imposition, were justifiable, and did not preclude him from insisting that he had the same rights that he would have had if he had paid full rates, or otherwise had obtained the consent of the company without fraud. It is a sufficient answer to say that if the company charged illegal rates, it was not done in charging Forgrave less, but some one else more; nor could the decedent properly obtain the rates made to Forgrave by personating Forgrave. Whether, if he had appeared in his own name and demanded that the rates made to Forgrave should be made to him, and the company had refused, he would have had a right to complain, we need not determine, as we have no such case.

Another position taken by the plaintiff is that the ticket provides for its own penalty for its violation, to wit, a forfeiture, and no other penalty can be added. But the question before us is not as to the enforcement of a penalty by the company, but as to whether the decedent acquired the rights of a passenger. The right of the company to insist that he did not, if he never properly acquired the consent of the company to carry him as such, is independent of any question of penalty. We think the instruction given by the court is erroneous, and that the judgment must be reversed.[1]

[1] Creation of relation of carrier and passenger.—Beale in 19 Harv. L. Rev. 250.

2. Obligations of Common Carriers.

a. Obligation to Serve All Travelers.

BENNETT v. DUTTON, 10 N. H. 481.

(1839)

The declaration alleged that the defendant was part owner and driver of a public stage-coach from Nashua to Amherst and Francestown; that on the 31st January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence, that at the time of the grievance alleged there were two rival lines of daily stages, running between Lowell, in Massachusetts, and Nashua; that Jonathan B. French was the proprietor of one of these lines, and Nelson Tuttle of the other; that Tuttle's line ran no farther than from Lowell to Nashua; that French and the proprietors of the defendant's line were interested in a contract for carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

The plaintiff was notified, by the agent of the line of French and the defendant, at Lowell, previous to taking passage in Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day, in the regular mail line, he must take the mail line at Lowell; and that if he took passage in Tuttle's line from Lowell to Nashua he would not be received, at Nashua, into the defendant's coach.

Position of one who has paid his fare, while waiting at station, boarding train, etc. 19 Harv. L. Rev. 251-262.
Who are passengers in general.—23 Harv. L. Rev. 343-346.

The parties agreed that judgment should be rendered for the plaintiff, for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

PARKER, C. J. It is well settled that so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition. Story on Bailments, 328; 5 Bing. R. 217 [169], Riley v. Horne (15 Eng. C. L. R. 426).

And stage-coaches which transport goods as well as passengers, are, in respect of such goods, to be deemed common carriers, and responsible accordingly. Story, 325.

Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies, except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stage-coach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. 2 Sumner, 221 [519], Jencks v. Coleman: 19 Wend. R. 239.

The principle which requires common carriers of goods to take all that are offered, under the limitation before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. 8 N. H. Rep. 523, Markham v. Brown. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stage-coach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach; and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers beteewn those places. But, by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua, in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case, or class of cases, on account of their agreement with French.

It is further contended that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell; and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided, in New York, that stage-coach proprietors are answerable, as common carriers, for the baggage of passengers; that they cannot restrict their common-law liability by a general notice that the baggage of passengers is at the risk of the owners; and that if a carrier can restrict his common-law liability it can only be by an express contract. 19 Wend. 234 [173], Hollister v. Nowlen. And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. 19 Wend. 251, Cole v. Goodwin. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from

Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished, because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.

TARBELL v. THE CENTRAL PAC. R. R. CO., 34 Cal. 616.

(1868)

On the trial, which was by the Court with a jury, plaintiff proved (the defendant objecting and excepting thereto for irrelevancy and incompetency) that while on the defendant's moving train of passenger cars, at a point about five miles from Auburn, towards Colfax, he having entered the train at Auburn, he tendered to the conductor of the train, upon the usual demand being made of him for his ticket or fare, the legal passenger fare chargeable between the Auburn and Colfax railroad stations, in the legal tender notes of the United States. The conductor refused to accept the payment so tendered, and demanded

that it be made in the gold or silver coin of the United States, and on the failure and refusal of plaintiff to make the payment as required, caused the train to be stopped and plaintiff to be ejected therefrom. Plaintiff had a verdict and judgment for five hundred dollars damages. The defendant moved for a new trial upon a settled statement of the evidence and rulings of the Court on demurrer and the admission of evidence, on grounds of alleged error in law occurring at the trial, that the verdict and judgment were against law, and that the verdict was excessive. The motion was denied, and defendant appealed from the judgment and the order of the Court denying a new trial.

By the Court, SANDERSON, J.:

In actions of this character it is not necessary that the plaintiff should allege a strictly legal tender of his fare. It was so held in the case of Pickford v. The Grand Junction Railway Company, 8 M. & Wels. 372. It is sufficient to allege that he was ready and willing and offered to pay the defendant such sum of money as it was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts. If the plaintiff was ready and willing and offered to pay the legal fare when demanded by the conductor of the train, the defendant was bound to carry him, provided there was room in the cars and the plaintiff was a fit person to be admitted. This results from the nature of the defendant's business, which makes it its duty to receive all persons as passengers who offer to become such, upon their offering to pay the legal fare. Whenever the performance of a duty or obligation is thus cast upon the one party in consequence of a contemporaneous act of payment by the other, it is sufficient if the latter is ready and willing to pay when the former is ready to undertake the duty. (Rawson v. Johnson, 1 East, 203.)

The complaint in this case might have been drawn with more directness and precision in this respect, but we are disposed to hold that the Court below did not err in overruling the demurrer. It would have been more certain had the amount of the fare been stated which the plaintiff offered to pay, and that the person to whom the offer was made was the conductor in charge of the train; but we are not prepared to say that it is not sufficient in its present form.

The point that the defendant was not bound to carry the plaintiff because the fare which he offered to pay was in legal tender notes, is not tenable. Conceding that a statute authorizing defendant to demand coin in payment of fare would be constitutional, no such statute exists, and there being no contract in writing stipulating for coin, we find nothing in the case which takes it out of the operation of the Act of Congress in relation to legal tender notes. Railroad fares are not taxes, and do not fall within the rule in Perry v. Washburn, 20 Cal. 318.

Whether the defendant could have legally exacted payment in coin before the plaintiff was admitted into the cars and the journey commenced, is a question not involved in this case, and upon which we express no opinion. Having received the plaintiff and proceeded several miles upon the journey, the defendant must be held to have consented to receive in payment of the fare any good and lawful money which the plaintiff might tender when called upon for payment. The kind of money to be paid had then ceased to be an open question, for the contract was already made and in process of performance.

The verdict, however, was excessive. No special damages were alleged or proved. It was not pretended that this is a case for punitive damages, or that the business of the plaintiff suffered in any way by reason of his not being taken to Colfax. It does not appear whether the plaintiff proceeded on to Colfax or returned to Auburn after he was put out of the cars, or, whichever he did, if he did either, that he was put to any expense in doing it. Whether the plaintiff was going to Colfax upon urgent business or merely for pleasure, is not shown. In short, there is no evidence in the transcript which has any bearing upon the question of damages except the naked fact that he put out of the cars at a point ten or twelve miles from the place of his destination, and about five from the place of his departure. Such being the only evidence bearing upon the question, we think the verdict greatly disproportionate to the injury proved, within the rule in Aldrich v. Palmer, 24 Cal. 513.

A new trial must be granted, unless the plaintiff elects, within fifteen days, to take a judgment for one hundred dollars, which

sum we think amply sufficient compensation for the injury which he sustained.

So ordered.

THURSTON v. UNION PAC. R. CO., 4 Dillon (U. S. Cir.) 321; Fed. Cas. No. 14,019.

(1877)

It was alleged, and not denied, that plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it, but was prevented. He also purchased, for ninety cents, from the company, a ticket good on another road, but was forcibly ejected from the train, and obliged to remain in Omaha several days before he could safely get away, for which he asked $5,000 damages. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler—a "monte-man," so-called—and was then engaged in traveling on the defendant's road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. The question was, whether the defendant has the right to exclude gamblers from its trains. Upon this point the charge of the court is given below.

DUNDY, J. The railway company is bound, as a common carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for

the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz.: what he paid for the ticket, and, perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages ($1.74) and costs, the company not having tendered the money.

Judgment on verdict.[1]

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b. Obligation to Provide Reasonably Adequate Facilities and Service.

BREMNER v. WILLIAMS, 1 C. & P. 414.

(1824)

Assumpsit against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury

[1] Blindness as ground for rejection.—18 Harv. L. Rev. 540; 19 Harv. L. Rev. 298.

sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

BEST, C. J. The declaration states, that the defendant undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence. The driver said, it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion, that it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. For, when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

Verdict for the plaintiff—damages £51.

McPADDEN v. THE NEW YORK CENT. R. CO., 44 N. Y. 478.

(1871)

This action was brought to recover for injuries sustained by the plaintiff, while a passenger upon the defendant's road. The cause was tried at the Rochester circuit, in Jannary, 1865; and it appeared, among other things, that, on the 5th day of January, 1864, the plaintiff took passage on a train at Rochester going westerly, intending to go to Knowlesville. The train stopped at Brockport, and there met a train coming east. About half a mile west of Brockport the two passenger cars of the train going west were thrown from the track, and the car in which the plaintiff was riding was overturned, and he was injured. The train going west was not under full headway, going at the

rate of about twenty-five miles per hour. The train going east passed the place of the accident at the rate of twenty-five to thirty miles per hour.

The accident was caused by a broken rail, a piece of the rail, about four feet in length, being broken in three or four pieces. All the witnesses who testified upon the subject testified that the rail was a good, sound and perfect rail, and in all respects properly placed and fastened, and they attributed the breaking to the coldness of the weather, it being a very cold morning. A track watchman went over the track three miles west of Brockport, starting at three o'clock that morning, and a train followed him west in about an hour. He then returned over the road to Brockport, reaching there a little before six o'clock, a short time before the accident. After the train passed east, he had no time to go over the road again before this train went west. When he went over the road, he found it in good order. The conductor and engineer of the train going eastward testified that they did not notice any jolt, at the place of the accident, of their train, and that, if the rail had been broken and displaced by their train, they would have noticed it. The engineer of the train going west testified that he did not discover that any rail was displaced, and would have discovered it, if one had been displaced, before his engine passed over; and the conductor of this train testified that he could feel the jog when a rail was displaced.

At the close of the evidence, the counsel for the defendant moved for a nonsuit upon the ground that there was no proof of negligence or omission of duty on the part of the defendant, but that there was clear evidence that every precaution to insure safety to passengers had been taken. The counsel for the plaintiff then asked to go to the jury upon the question whether the rail was broken before the train going west came upon it. The court refused permission to him to do so, and nonsuited the plaintiff, and his counsel excepted, but did not request to go to the jury upon any other question.

The General Term made an order granting a new trial, and the defendant appealed from such order to this court, stipulating for judgment absolute in case the order should be affirmed.

The case below is reported, 47 Barbour, 247.

EARL, C.[1] The General Term granted a new trial, upon the ground that the judge, at the circuit, should have submitted to the jury the question, whether the rail was broken before it was reached by the train going west carrying the plaintiff; and it held, if it was thus broken, that the defendant was liable, irrespective of any question of negligence, within the principle of the case of Alden v. The N. Y. C. R. R. Co. (26 N. Y., 102), upon the ground that it was bound to furnish a road adapted to the safe passage of trains, or in other words "a vehicle-worthy road."

I am obliged to differ with the General Term, for two reasons; 1st. If the rail was broken before it was reached by the train going west, it must have been broken by the train going east shortly before, and there is no evidence whatever that it was broken by that train. All the evidence tends to show that it was broken by the train going west. Such is the evidence of the conductors and engineers of both trains. There is no presumption that the rail was broken before this train reached it. It is unquestioned that the accident was caused by the broken rail, and if the plaintiff claimed that the defendant was liable, because the rail was broken before the train upon which he was riding reached it, it was incumbent upon him to prove it. This he failed to do; and if the jury upon the evidence had found it, it would have been the duty of the court to set the verdict aside as against the evidence.

But there is another reason. It does not appear that plaintiff's counsel, upon the trial, claimed that he had shown negligence against the defendant, and he did not claim to go to the jury upon any such question, and the General Term did not grant a new trial upon the ground that there was any question of negligence in the case, which ought to have been submitted to the jury, but upon the ground above stated.

In the case of Alden v. The New York Central Railroad Company, the accident by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide roadworthy vehicles, and that the defendant was liable for the plaintiff's injuries caused by a crack in the axle, although the defect could

[1] Opinion of Lott, Ch. C., omitted.

not have been discovered by any practical mode of examination. That case was a departure from every prior decision and authority to be found in the books of this country or England, and, so far as I can earn, has never been followed anywhere out of this State. It was in conflict with the previous case, in the same court, of Hegeman v. The Western Railroad Corporation (3 Kern., 9). The only authority cited to sustain the decision was the English case of Sharp v. Grey (9 Bing., 457), and yet the decision has been distinctly repudiated in England, in the well considered case of Readhead v. Midland Railway Co., first decided in the Queen's Bench (Law Reports, 2 Q. B., 412), and then on appeal in the Exchequer Chamber (Law Reports, 4 Q. B., 379), where it was unanimously affirmed in 1869; and the court held that the contract, made by a common carrier of passengers for hire, with a passenger, is bound to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and that it does not contain or imply a warranty that the carriage in which he travels shall be in all respects perfect for its purpose and roadworthy. In the Exchequer Chamber, Mr. Justice Smith, writing the opinion of the court, alludes to the case of Alden v. The New York Central Railroad Company, and dissents from it, and comments upon the case of Sharp v. Grey, relied upon in that case, and he shows clearly that it was no authority for the broad doctrine laid down in that case. He says: "We have referred somewhat fully to this case (Sharp v. Grey), because it was put forward as the strongest authority in support of the plaintiff's claim, which can be found in the English courts, and because it was relied on by the judges of the Court of Appeals, in New York, in a decision which will be afterward referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision." Hence the case of Alden v. The New York Central Railroad Company has no foundation of authority whatever to rest on, and the only reason given for the decision is that the new rule adopted would be plainer and easier of application than the one that had been recognized and acted upon for hundreds of years. It was always supposed that there was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the

common carrier of passengers. The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.

I have thus commented upon and alluded to the case of Alden v. The New York Central Railroad Company, with no design to repudiate it as authority, but for the purpose of claiming that it is a decision which should not be extended. I am unwilling to apply it to every case that apparently comes within its principle; nor would I limit it to the car in which the passenger was riding. The whole train must be regarded as the vehicle; and the engine and all the cars attached together must be free from defect and roadworthy, irrespective of negligence. So far, and no farther, am I willing to regard that case as authority. Shall it be applied to steamboats and vessels, common carriers of passengers upon the ocean and our inland waters? Shall it apply to innkeepers, proprietors of theaters and other places of public resort, who invite the public into their buildings, for a compensation? And shall all such persons be held to an implied warranty that their buildings, with the appurtenances, are suitable and proper, and free from all defects which no foresight could guard against or skill detect? Shall it be applied to the roadbed of a railroad? If so applied, where shall it stop? It must also extend to the bridges, masonry, signals, and, in fact, to all the different parts of the system employed and used in the transport of passengers by railroad. And, as railroad companies are responsible for the skill and care of their human agents, such an extension of that decision would make them substantial insurers of the safety of all their passengers, and thus practically abolish the distinction between the liability of the carriers of passengers and the carriers of goods. While such a rule would "be plain and easy of application," I am not satisfied that it would be either wise or just. Railroads are great public improvements, beneficial to the owners, and highly useful to the public. There is a certain amount of risk incident to railroad travel, which the traveler knowingly assumes; and public policy is fully satisfied, when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travelers.

If, therefore, the jury had found that the rail was broken by the eastward bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable.

I am, therefore, in favor of reversing the order of the General Term, and ordering judgment upon the nonsuit, for the defendant, with costs. * * *

LEONARD, C. This case is distinguished from that of Alden v. The New York Central Railroad Company (26 N. Y., 102). In that case there was a defect in the axle, which caused the break. It could not have been discovered without removing the wheel. The Court of Appeals held that the difficulty of discovering the defect did not excuse it. The fact that the defect existed was enough, and in case of an injury caused thereby the company was held to be liable. It appeared that there was a test, which might have been applied in the construction, which would have developed the crack or flaw in the iron where it broke. (Hegeman v. The Western Railroad, 3 Kern., 9.)

Bending the axle, while in the process of construction, would have led to a discovery of the crack or flaw. This established negligence on the part of the company. There was no defect in the iron of the track in the case under consideration. There was no dispute on this point. The iron was good, and no crack or flaw appeared. The break was caused by the exceeding cold weather. This was the result of a vis major, against which no prudence could have guarded. But it is said that the break may have existed from the time the previous train going easterly passed over the track (some few minutes prior to the accident), and that if this was so, as the jury might from the evidence have found, that this case would then be brought within the principle of the case of Alden (26 N. Y. R.), before referred to. If the fact should be so found, it is contended that the track was for a few minutes in a broken condition, incapable of serving the purpose of its construction, from which the company would be liable in case of an injury.

This position is not sound, for the reason that the evidence is also uncontradicted, that the track had just been examined prior to the passing of the train going easterly, and found to be in good condition; and it was impossible for another exam-

ination to have been made before the train which carried the plaintiff reached the point where the accident occurred.

It has been said that the case of Alden (supra) holds, substantially, that the railroad company guaranty that their road and all its appointments are perfect or without defect. It may be, that liability for a defect which the company could not discover by any diligence, short of taking the machine to pieces or destroying it, amounts to a guaranty of perfection, as claimed. The principle of negligence is still the foundation of the liability.

In the present case no defect existed, or if it did exist for a few minutes, no human diligence or foresight could have discovered or prevented it. An impossibility is not demanded by the law, nor by the decision in Alden's case. The defect existed there, and it might have been discovered and prevented by attention and examination, or by the application of all the tests known to skill and science in the construction of the axle. Its omission was negligence, for which the company were held to be liable. It was no impossibility which was there demanded. Here the demand would have that extent before the liability for damages could be held to apply. The case of Alden imposes no new rule not before known to the law. It holds that the carrier of passengers is guilty of negligence, if there is any defect in the vehicle by which they are carried and an injury occurs thereby. The existence of such a defect is so held, as matter of law, if it could have been discovered or remedied by any possible care, skill or foresight. The facts before the court in that case authorized no other deduction or conclusion.

It is the same principle applied in Sharp v. Grey (9 Bing., 457), where the court held that the carriage, used for carrying passengers, must be roadworthy; that is, if there is any defect which might, by any care or foresight, have been prevented, from which a personal injury occurs, it is negligence as matter of law. Some defect has been proven to have existed in every case where a liability has been imposed for a personal injury, and the existence of the defect was attributed to a want of such care or foresight as might have prevented it. When a passenger travels by a ship, whether navigated by sails or steam, or travels by coach or rail-car, or any other public conveyance, he expects to take, and does take, the hazard of such accidents as may occur to him without any want of care or

diligence on the part of the carrier. The carrier is not liable for an injury to a passenger by the action of the elements, where no care or foresight, skill or science, could have guarded against the accident which occasioned it.

The nonsuit was properly granted, and the General Term were in error, and must be reversed.

Order of the General Term reversed, with costs, and judgment upon the nonsuit ordered, with costs. Hunt, C., dissenting.

CRAKER v. CHICAGO, ETC., R. CO., 36 Wis. 657.

(1875)

Action for insulting, violent, and abusive acts alleged to have been done to the plaintiff by the conductor of one of defendant's trains while plaintiff was a passenger on such train. Answer, a general denial.

The court refused a nonsuit, and instructed the jury, in substance, that if plaintiff, whilst a passenger as above stated, was abused, insulted, or ill-treated by the conductor of the train, defendant was liable to her for such injury as might be found from the evidence to have been inflicted. Defendant requested the court to instruct the jury, that upon the evidence plaintiff was not entitled to recover, "the acts of the conductor complained of not having been committed within the scope of his employment or in the performance of any actual or supposed duty;" but the instruction was refused.

Plaintiff had a verdict for $1,000 damages; a new trial was denied; and defendant appealed from a judgment on the verdict.

RYAN, C. J.[1] There can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the mali-

[1] Abridged.

cious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it.

In Bass v. Railway Co., we had occasion also to consider somewhat the nature of the obligations of railroad companies to their passengers under the contract of carriage; the "careful transportation" of Railroad Co. v. Finney. On the authority of such jurists as Story, J., and Shaw, C. J., we likened them to those of innkeepers. And, speaking of female passengers, we said: "To such, the protection which is the natural instinct of manhood towards their sex, is specially due by common carriers." In Day v. Owen, 5 Mich. 520, the duties of common carriers are said to "include everything calculated to render the transportation most comfortable and least annoying to passengers." In Nieto v. Clark, 1 Clifford, 145, the court says: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach." Long before, Story, J., had used this comprehensive and beautiful language, worthy of him as jurist and gentleman, in Chamberlain v. Chandler, 3 Mason, 242; "It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil." These things were said, indeed, of passage by water, but they apply to passage by railroad. Commonwealth v. Power, 7 Met. 596.

These are among the duties of the appellant to the respondent, when she went as passenger on its train: duties which concern public welfare. These were among the duties which the appellant appointed the conductor to perform for it, to the respondent. If another person, officer or passenger or stranger, had attempted the indecent assault which the conductor made upon the respondent, it would have been the duty of the appellant, and of the conductor for the appellant, to protect her. If a person, known by his evil habits and character as likely to attempt such an assault upon the respondent, had been upon the train, it would have been the duty of the appellant, and of the conductor for the appellant, to the respondent, to protect her against the likelihood. Stephen v. Smith, 29 Vt. 160; Railroad Co. v. Hinds, 53 Pa. St. 512; Commonwealth v. Power, supra; Nieto v. Clark, supra; and other cases cited in Bass v. Railway Co. We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a reductio ad absurdum. The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against all the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity. * * *

We cannot think that there is a question of the respondent's right to recover against the appellant, for a tort which was a

breach of the contract of carriage. We might well rest our decision on principle. But we also think that it is abundantly sanctioned by authority. Railroad Co. v. Finney, Bass v. Railway Co., Weed v. Railroad Co., Nieto v. Clark, Railroad Co. v. Hinds, and Railroad v. Rogers, supra; Railroad Co. v. Derby, 14 How. 468; Moore v. Railroad Co., 4 Gray, 465; Ramsden v. Railroad Co., 104 Mass. 117; Maroney v. Railroad Co., 106 Mass. 153; Coleman v. Railroad Co., 106 Mass. 160; Bryant v. Rich, 106 Mass. 180; Railroad Co. v. Vandiver, 42 Pa. St. 365; Railroad Co. v. Anthony, 43 Ind. 183; Railroad Co. v. Blocher, 27 Md. 277; Railroad Co. v. Young, 21 Ohio St. 518; Sherley v. Billings, 8 Bush, 147; Seymour v. Greenwood, 6 Hurl & N. 359; Bayley v. Railroad Co., L. R. 7 C. P. 415. There are cases even of recent date, which hold the other way. But we think that the great weight of authority and the tendency of decision sanction our position. * * *

BY THE COURT.—The judgment of the court below is affirmed.[1]

GRAND RAPIDS, ETC., R. CO. v. HUNTLEY, 38 Mich. 537.

(1878)

Trespass on the case. Defendant brings error.

CAMPBELL, C. J. Suit was brought by Mrs. Huntley for personal injuries suffered on the 5th day of November, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset. The testimony showed that the mischief was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. * * *

The principal remaining questions arise out of the rule of liability established by the charge.

The primary cause of the accident was the broken axle. Some stress seems also to have been laid on the condition of the track and the rate of speed. So far as appears upon the record, we have not discovered any proper evidence to authorize these matters to be considered. There is no testimony

[1] Hayne v. Union St. R. Co., 189 Mass. 551, 3 L. R. A. (N. S.) 605 (1905).

from such persons as are qualified to give opinions on the subject that either the condition of the road or the speed indicated negligence. Whether the structure of a road is such as to warrant fast travel is not a question which usually belongs to ordinary witnesses, and it would be dangerous to allow a jury to act on its own suspicions or prejudices in such a matter. The road, if in such a condition as would be regarded as safe by railroad men of usual intelligence and experience, could not be complained of for any possible deficiencies which would not be regarded by competent persons as existing, nor could the rate of speed be properly held excessive without similar evidence from men of experience. It is a matter of daily occurrence in many parts of the country, and of occasional occurrence everywhere, for cars to be run at very high rates of speed on railway tracks. No particular rate can be assumed, without proof, to be dangerous.

The main question, however, relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles.

This doctrine is, we think, entirely incorrect. Carriers of freight are liable whether careful or not, for any act or damage not caused by the act of God or of the public enemy. Their liability, therefore, does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. M. C. R. R. v. Coleman, 28 Mich., 440; G. R. & I. R. R. v. Judson, 34 Mich., 506; Ft. Wayne, J. & S. R. R. v. Gildersleeve, 33 Mich., 133; M. C. R. R. v. Dolan, 32 Mich., 510. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from

whom they made their purchases of stock, however high in standing and reputation as reliable persons.

There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

The case of Richardson v. Great Eastern Railroad Co., L. R. 1 C. P. 342 (Court of Appeals), is quite in point and establishes the doctrine as it has been fixed by the general understanding since the carrying of passengers has been the subject of legal discussion. That was a passenger case, depending on the doctrine of negligence as applied to defective trucks. The axle of a truck belonging to another company, brought on the line of the respondents to be forwarded, was broken by reason of a flaw which might have been discovered by a minute examination, but which was not discovered in fact by such an examination as was customary and reasonably practicable. It was held no negligence could be imputed for not making a more minute examination than was made. In that case the court also held that it was not within the province of a jury to lay down rules after their own opinion, which imposed duties beyond the usual practice of prudent railways. See also Daniel v. Metropolitan Railway Co., L. R. 5 H. of L., 45, upon the right of a railway company to assume there is no negligence in others over whom they exercise no control.

The injustice and illegality of holding passenger carriers to anything like a warranty of their carriages was very fully discussed and asserted in Readhead v. Midland Rw. Co., L. R. 4 Q. B., 379. The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none in fact.

We think the judgment erroneous, and it must be reversed with costs and a new trial be granted.

The other justices concurred.

CAMDEN, ETC., R. CO. v. HOOSEY, 99 Pa. St. 497.

(1882)

MR. JUSTICE STERRETT delivered the opinion of the court.

The single breach of duty with which the defendant below was specifically charged, as the only ground of liability to the plaintiff for the injury he sustained in falling off the platform of the car on which he was then standing, was the failure of the company to provide a sufficient number of cars to seat all the passengers on the train.

Without assenting to the broad proposition contended for, that a railroad company, using steam motive power, is bound absolutely and under all circumstances to provide every passenger on the train with a seat, it cannot be questioned that, as a general rule and under ordinary circumstances, it is the duty of such company to provide suitable car accommodations, and seats for those whom it undertakes to carry; and if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect of duty in that regard, the latter is liable to respond in damages for the injury thus occasioned solely by its own negligence. There appears to be nothing in the circumstances of this case to exempt the company from that general rule of duty; and if its negligence was the proximate cause of the plaintiff's injury, the liability of the company would necessarily follow, unless the plaintiff himself was guilty of negligence which contributed thereto. His contention was that, in

common with many other passengers, he was unable to procure a seat, and while searching for one he was thrown from the platform of one of the cars, and thus sustained the serious injury which resulted in the loss of his arm. The over-crowded condition of all the cars composing the train, and the consequent inability of the plaintiff and others to procure seats, were facts clearly proven.

It is very evident from the plaintiff's own statement that, at the time of the accident and for some minutes before, he was not in the act of passing from one car to another in search of a seat; on the contrary, he was standing quite near the edge of the platform with his back to the end window of the car. He was not only in a position of known danger, but was there voluntarily and in disregard of the rules of the company. There is nothing in the testimony from which a jury would be justified in coming to any other conclusion. While he was thus standing on the platform, persons passed from one car to the other in both directions, and there is nothing whatever to show that he could not have gone into the next car if he had been so disposed. Neither he nor any other witness pretends to say it was necessary for him to stop and stand on the platform.

In the seventh point of the defendant below, the court was requested to charge "That even if a search for a seat was the real purpose of the plaintiff in going out on the platform, and even if it were not negligence for him to have crossed from car to car for that purpose, yet, if the jury believe from the evidence that he lingered on the platform, instead of immediately crossing, the verdict should be for the defendant." The learned judge, in affirming this proposition, added the qualifying words, "unless compelled thereto by circumstances." The jury was thus authorized to inquire whether or not the plaintiff was compelled by circumstances to linger on the platform. We see nothing in the testimony to warrant the submission of this inquiry to the jury. As already intimated, there was not a particle of testimony from which it could be reasonably inferred that the plaintiff was compelled to take or retain the position he did on the platform. Having shown by his own testimony that at the critical juncture he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to prove that he was there from necessity and not from choice.

While the latter was clearly shown, there was no testimony tending to prove the former. The point should have been affirmed without the qualification complained of. But, for reasons already suggested, we think the court should have gone further, and instructed the jury as requested in defendant's ninth point, which was: "That the evidence shows negligence on the part of the plaintiff which contributed to produce the injury complained of, and therefore he cannot recover."

The dangerous position on the platform in which the plaintiff voluntarily placed himself, while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off. If there had been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury; but, in the absence of such evidence, it was error to refuse the point, and leave it to the jury to determine whether he was or was not guilty of contributory negligence.

Of all the passengers on a long train of twenty overcrowded cars the plaintiff was the only one who appears to have been injured. If he had submitted, as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than passing from car to car, while the train was in rapid motion, it is not at all probable he would have been injured. His much-to-be-regretted misfortune was the result of his own carelessness. This was clearly proved by uncontroverted testimony, from which no other conclusion could reasonably be drawn.

MERCUR, GORDON, and TRUNKEY, JJ., dissented.

Judgment reversed.

PENISTON v. CHICAGO, ETC., R. CO., 34 La. Ann. 777.

(1882)

POCHÉ, J. Plaintiff, a passenger on a train of the defendant from Chicago to New Orleans, was injured while walking from an eating station to her train, on the defendant's road, and has recovered, in this suit, a verdict and judgment for damages in the sum of six thousand dollars.

The evidence is decidedly conflicting, but a careful reading of the record has satisfied us that the following facts are established:

On the 31st of January, 1878, while the plaintiff, accompanied by her daughter and her son-in-law, were passengers on a train of the defendant, from Chicago to New Orleans, they came out of their car about eight o'clock at night, at Hammond Station, then a regular supper station on said road, according to its schedule, for the purpose of taking necessary refreshments.

The building in which meals are served is situated at a considerable distance from the railroad, and is reached by passengers who alight on the main track of the road, by crossing over a side track, and passing on a large platform, and thence through a narrower and covered platform which leads into the hotel.

On the arrival of the train, a torchlight burning on an elevated platform affords ample light to guide the steps of passengers to the covered platform, where two or three lamps light up the way to the interior of the building.

After supper, and on returning to their train, plaintiff and her companions discovered that the torchlight had ceased to burn, and that there was no other light or signals to guide their steps securely through the large platform in front of the hotel to their train, and that there was no officer or employe of the company charged with the duty of pointing out to passengers the way from such platform to their train. Their train, which they had left on the main track, had been removed therefrom and placed on the side track lying next to the hotel, and another train, since arrived, was then occupying the position on the main track, where they had left their train on alighting for supper. They had received no information, officially or otherwise, of those changes, operated while they were in the supper room.

Finding a train on the side track, and believing that to be a new train, which was standing between them and their train, they concluded to go around said former train, so as to reach theirs, and to do so they followed the platform fronting the hotel, and on which there was no light, and not noticing the termination on said platform on two steps of stairs leading to the main ground, plaintiff, who walked in the lead of her companions, fell to the ground, dislocating her ankle and fracturing her leg in two places, from which she suffered great pain, was confined to her room for four months, was compelled to walk on crutches for eight months, and from which injuries she has not yet recovered the free use of her limb.

Defending under a general denial, the corporation urges its want of responsibility, on the grounds:

1. That the hotel and platform are not the property of the company, but of another person, for whom defendant is in no manner responsible.

2. That the accident occurred through plaintiff's own fault, who should not have attempted to walk around the train on the side track, which was her train, the approach of which, from the eating station, was made easy and safe by lights burning in the covered platform and in a lunch stand situated at the rear end of said gangway, and who should have made inquiries concerning her train.

These propositions involve the discussion of the degree of care, attention, and protection which railroad companies, as common carriers, owe to their passengers.

In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reasonable time for the purpose of sustaining life, by means of food and necessary refreshments. Hence it is, that on all such roads, arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train by employes of the road on the approach of a train to a station where, under arrangements with the company, meals are prepared for the convenience of its passengers.

It is well established in jurisprudence that railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, &c., and it is well settled that any person injured, without fault on his part, by any dereliction of its duty in the premises by a railway company, can recover damages against the corporation for injuries thus received. Cooley on Torts, pp. 605, 606, 642; Addison on Torts, § 245; Shearman & Redfield, p. 327, § 275.

This principle has been applied in a case where a passenger, an old lady, was put out at her destination, at a station where there was no light to guide her steps, and no employe of the company to show her the way out of the station grounds, and was injured in trying to go from the station to a friend's house,

by falling from the platform. Patten v. Chicago & Northwestern R. R. Co., 32 Wis. 528.

Under the same rule, a railway company was held responsible for injuries received by a passenger in walking from one of its trains to a transfer boat, by falling on a wharf on which there was not sufficient light. Beard v. Conn. & Pass. Rivers R. R. Co., 48 Vt. 101.

In the enforcement of the same rule, a railway company was mulcted in damages in a case where a lady passenger, alighting from her train at her destination, and finding no safe and convenient platform leading to the highway, attempted to walk across three of the railroad tracks, and falling in a "cattle-guard" filled with snow, was run over and killed by another train of the same company. Hun, N. Y. Reports, vol. 13, 589; see also 56 Me. 244; 16 How. 469.

The obligation of furnishing, by railway companies, safe and easy ingress and egress to and from their platforms, has been extended so as to embrace cases of persons who were not passengers on their roads, but who came on business to their stations, and were injured by means of insufficient or defective platforms, such as a hackman who had transported passengers to a railroad depot. 58 Maine, 183; see also Jamison v. San Jose R. R. Co. (California), 11 Reporter; Law v. Grand Trunk R. R. Co. (Maine), 12 Reporter, p. 397.

Fully endorsing and concurring with this jurisprudence, we hold that the defendant company is legally bound to furnish to its passengers an easy and safe mode of going to and from its trains, and such eating stations as it may have provided for the wants and convenience of its passengers, and that for the purpose of enforcing this obligation, it is immaterial whether the eating station is owned and kept by the company or by another person, with an understanding with the company as to the time of preparing and furnishing the meals.

In our opinion, this obligation imposes upon the railway company the duty of having ample and sufficient lights, for meals furnished at night, to safely guide their passengers to and from the hotel or eating station, and in case trains are removed from one track to another during the meal, to inform, by employes, the passengers on their egress from the eating or dining room, of the exact location of their respective trains.

We have given due and respectful consideration to the testimony of defendant's witnesses, who state that the platform was sufficiently lighted for all purposes needed by the passengers. These witnesses are the train conductor, two or three other railroad employes, the proprietor of the hotel, his lessee, who keeps it, and the local postmaster, who are all familiar with the place, are there at the arrival of every train, which they all designate by their numbers, are familiar with the rules of the company, and know that during the supper meal the southbound train is moved to the side track from the main track, which is then occupied by the northbound train. It stands to reason that the light which will be sufficient to enable such persons to move about in perfect safety, will not be sufficient to safely guide a stranger, especially a woman who comes from a distant land, is aroused in her sleeping car by the sudden and shrill announcement by a brakeman of "twenty minutes for supper," and alights from her car in the brilliant torchlight, is shown to the hotel by numerous and zealous runners or servants, in great eagerness to secure her patronage, and who lost sight of her after receiving her money, and now that the torch is out, she is left alone, unaided and unprotected, to grope her way in darkness to her train, which is not now where she left it a few minutes before. Hence, it is but fair, reasonable, and just, to hold the railway company strictly responsible for the injuries which she received in her attemept to discover the location of her train on which she was a passenger. * * *

The judgment of the lower court is, therefore, affirmed with costs.

Rehearing refused.

MEMPHIS, ETC., R. CO. v. BENSON, 85 Tenn. 627.

(1887)

LURTON, J. This was a suit for damages for an alleged unlawful ejection of the defendant in error from the train of the plaintiff in error. There was a judgment for $500 in favor of the defendant in error rendered by the circuit judge, who tried the case without a jury. The railway company have appealed, and a number of reasons are assigned for reversal.

The defendant in error went upon the passenger train at Memphis, Tenn., and went into the car set apart for ladies and gentlemen traveling with ladies. This car at the time was overcrowded, and he was unable to obtain a seat, and this condition of things he saw before the train left Memphis, yet he made no demand at Memphis, the terminal station, for a seat; but, preferring to take his chances to get a seat, he remained on the car standing until after the train had started upon its trip. After the train had gotten well out of Memphis the usual demand was made upon him for his ticket. This he declined to surrender, taking the position that he would not surrender his ticket until he had been furnished with a seat. The conductor called his attention to the fact that there was not a vacant seat in the car in which he was, and offered to get him a seat in the next forward car, and further saying that it would be but a short time before seats would be vacated by passengers for local stations, and that he would then give him a seat in the ladies' car. This he declined, and demanded a seat in the ladies' car before surrendering his ticket.

The demand of the conductor for his ticket was renewed in a short time, with the statement that he must either get off the train or surrender his ticket. This demand was again refused, and he further declared that he would not leave the train. Upon the train stopping at the next regular station he, still refusing to leave the train, was ejected.

He neither surrendered his ticket to the conductor nor showed that he had such ticket, nor did he state the point to which he was destined. He bases his refusal to go into the forward car upon the ground that it was a smoking car, and that the foul air of such a car was likely to make him ill.

There can be no doubt that the contract of a carrier of passengers by railway is one not only to furnish the passengers with transportation, but with the comfort of a seat. The contract is no more performed by furnishing him a seat without transportation than it is when he is offered transportation without a seat. It is equally well settled that the passenger need not surrender his ticket until he is furnished with a seat, for the ticket is the evidence of the contract which entitles him to one. But it cannot be that one may ride free because not furnished with a seat. If the passenger chooses to accept transportation without a seat,

he must, on demand, pay his fare. If unwilling to ride without transportation is furnished him in a seat, he must get off at first opportunity, and by so doing may bring his action for breach of contract, and recover as damages such sum as will compensate him for such breach, including such damages as are the natural and immediate results of such breach. Rorer on Railroads, 968, 969; Davis v. Railroad, 53 Mo. 317; Railroad v. Leigh, 45 Ark. 368.

It results that for the indignity and vexation consequent upon the ejection in this case there can be no recovery. This result is made the more certain by th efacts of this case, it appearing that at the time this passenger entered the car at the terminal station he saw that this car, assigned to ladies, and gentlemen with ladies, was overcrowded, and he knew that he must either ride standing or take a seat in the car called the smoking car. He gave the railway company no opportunity to furnish additional seats while at this terminal station. We have at this term, in the case of Railroad Company v. Ida Wells, 1 Pickle, 613, held that a railroad company may make reasonable regulations concerning the car in which a passenger might be required to ride, provided that equal accommodations were furnished to all holding first-class tickets, and that a regulation assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable. This rule has been sustained in the courts of many states. Westchester Railroad Company v. Miles, 55 Penn. 209; Chicago & Northwestern Railroad v. ————, 55 Ill. 185.

So we think a regulation setting apart a car for ladies, or gentlemen accompanied by ladies, a reasonable regulation. A passenger may not dictate where he will sit or in which car he will ride. If he is furnished accommodations equal in all respects to those furnished other passengers on the same train, he cannot complain, and this was the substance of our decision in the Ida Wells case. The doctrine is equally applicable here. This passenger, when he took passage at Memphis, did it with knowledge that the ladies' car was crowded, and that he would either have to ride standing in that car or go into the car designed exclusively for gentlemen, and in which smoking was permitted. The requirement that he should go temporarily into the smoking car under these circumstances was not unreasonable. He ought not to have started when he did unless willing to submit to what

he realized was an inevitable necessity without giving the carrier notice of his demand. * * *

The conductor who ejected this passenger, while using no unnecessary force, did use unnecessarily abusive language, such as was calculated to unnecessarily insult and degrade the person ejected. In exercising a legal right of ejection, railway companies must not do so in an abusive way. They are the servants of the public, and while their right to enforce reasonable regulations will be upheld, yet the regulations must not only be reasonable in themselves, but the manner and method of enforcing such regulations must be reasonable, and free from unnecessary force, as well as from unnecessary indignity. The unreasonable demands of the defendant in error afford some excuse for the temper shown by the conductor.

In view, however, of the absence of any proof of a legal character that the ejected passenger had any ticket, and his refusal to pay fare, and that, therefore, the relation of passenger and carrier did not exist, we are constrained to reverse the judgment of the circuit judge, and enter judgment here for plaintiff in error, the carrier in such case not being held responsible for the ejection.[1]

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c. Obligation to Refrain from Discrimination.

THE CHICAGO, ETC., RAILWAY CO. v. WILLIAMS, 55 Ill. 185.

(1870)

This was an action on the case, brought in the court below by Anna Williams, a colored woman, against the Chicago & Northwestern Railway Company, to recover damages resulting to the plaintiff by reason of being excluded from the privileges of a

[1] A railway company must furnish seats to its passengers, unless there is a sudden and unexpected influx of passengers. A passenger may refuse to surrender his ticket or to pay his fare until furnished with a seat, but of course he may be ejected at a regular stopping place if he refuses to so surrender his ticket. Ferries are not under obligation to furnish seats to everybody. St. Louis, etc., v. Leigh, 45 Ark. 368; Hardenburg v. St. Paul, etc., 39 Minn. 3; Louisville, etc., Co. v. Patterson, 60 Miss. 421; Burton v. West Jersey F. Co., 114 U. S. 474.

Obligation to furnish adequate facilities applies to passenger elevators.—Treadwell v. Whittier, et al., 80 Cal. 574.

car upon the defendants' road, which had been designated, under the rules of the company, for the exclusive use of ladies, and gentlemen accompanied by ladies, the only reason for such exclusion of the plaintiff being on account of her color.

Upon a trial, the plaintiff recovered a judgment for $200, from which the company appealed.

Mr. Justice Scott delivered the opinion of the Court.

There is but one question of any considerable importance presented by the record in this case.

It is simply, whether a railroad company, which, by our statute, and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman, holding a first class ticket, for no other reason except her color.

The evidence in the case establishes these facts—that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resides at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first class car on their road. On the arrival of the train at the Rockford station, the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies' car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car, on appellants' train, there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station, and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car, except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or other-

wise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers traveling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike to the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the Ill. Cent. R. R. Co. v. Whittemore, 43 Ill. 423, that, for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable, and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made, must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of

law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance, the rule that set apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or, what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. The State v. Overton, 4 Zab. 435.

In the case of the West Chester & Philadelphia R. R. Co. v. Miles, 55 Penn. 209, it was admitted, that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations or prejudice, but it was held, not to be an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well-known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances, this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other

travelers, must be held to have no right to discriminate between passengers on account of color, race or nativity, alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say, that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do. * * *

Judgment affirmed.

INTERSTATE COMMERCE COMMISSION v. BALTIMORE & OHIO R. R., 145 U. S. 263.

(1892)

This proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati, & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices, as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons traveling together on one ticket will be transported ovr said lines of road between stations located thereon at two cents per mile per capita, which is less than the rate for a single person; said rate for a single person being about three cents per mile." * * *

The cause was heard before the commission, which found "that so-called 'party rate' tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets, within the meaning of section 22 of the act to regulate commerce, and that, when the rates at which such tickets for parties are sold are lower for

each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore & Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. * * *

MR. JUSTICE BROWN delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the "Interstate Commerce Act" (24 St. 379), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; Fitchburg Railroad Co. v. Gage, 12 Gray, 393; Baxendale v. Eastern Counties Railway Co., 4 C. B. (N. S.) 63; Great Western Railway Co. v. Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38; Johnson v. Pensacola Railway Co., 16 Fla. 623; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the States acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the State, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several States, and the evils which grew up under a policy of unrestricted competition, suggested the neces-

sity of legislation by Congress under its constitutional power to regulate commerce among the several States. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute,—only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburgh; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in Great Western Railway

Co. v. Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated as applicable to two individuals, applies to the purchase of a single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as "party rate tickets," and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted and open to the public at large.

But, assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle, beyond all doubt, that the

discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, States, or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion,—in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under State laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public,—it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party

rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips,—trips for long distances, and trips in parties of 10 or more,—lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveler, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25, or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or advantage to this par-

ticular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public, generally, a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to everyone doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously toward anyone it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago, & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes,

there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of 10 persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." * * *

In short, the substance of all these (English) decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and

that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald v. Hovey, 110 U. S. 619. * * *

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore affirmed.[1]

[1] d. Obligation to make reasonable charges.—Milwaukee El. R. & L. Co. v. City of Milwaukee (1898), infra; Minnesota Rate Cases, 33 Sup. Ct. Rep. 729 (1913), infra.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. * * *

"No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schdule then in force and the time when the changed rates, fares, or charges will go into effect.

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which

e. Diligence.

ASTON v. HEAVEN, 2 Esp. 533.

(1796)

Case against the defendants as proprietors of the Salisbury stagecoach, for negligence in the driving of the said coach; in consequence of which the coach was overset, and the plaintiff much bruised and her finger broke. * * *

EYRE, C. J. This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that whenever a case happens, even where there has been no negligence, he would take the opinion of the court, whether defendants circumstanced as the present, that is, coach owners, should be liable in all cases, except where the injury happens from the act of God or of the king's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur, he will be told that carriers of goods are liable by the custom to guard against frauds they might be tempted to commit by taking goods entrusted to them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of persons. This action stands on the ground of negligence only. * * *

The immediate cause of the accident is agreed on all hands. The question therefore depends on the consideration of whether there was any negligence in the driver. It is said he was driving with reins so loose, that he could not readily command his horses. If that was the case, the defendants are liable; for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from any unforeseen accident or misfortune, as from the horses suddenly taking fright; in such case the defendants are not liable. It is for the jury to say whether it proceeded from that cause or not.

The jury found a verdict for the defendants.

are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs; Provided, That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'" The Railroad Rate Act of 1906 (U. S.).

CHRISTIE v. GRIGGS, 2 Campbell, 79.

(1809)

This was an action of assumpsit against the defendant as owner of the Blackwell stage, on which the plaintiff, a pilot, was traveling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axletree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed—there rested his case.

Best, Sergeant, contended strenuously, that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskillful, or of the coach being insufficient.

Sir James Mansfield, C. J. I think the plaintiff has made a prima facie case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skillfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of the coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident.

The defendant then called several witnesses, who swore that the axletree had been examined a few days before it broke without any flaw being discovered in it; and that when the accident happened, the coachman, a very skillful driver, was driving in the usual track and at a moderate pace.

Sir James Mansfield said, as the driver had been cleared of everything like negligence, the question for the jury would be—as to the sufficiency of the coach. If the axletree was sound

as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

RAMSDEN AND WIFE v. BOSTON & ALBANY R. CO., 104 Mass. 117.

(1870)

Tort for an assault and battery. * * * Trial in the superior court, before Reed, J., who made the following report to this court:

"This is an action of tort. The pleadings make a part hereof. The plaintiffs introduced evidence tending to show that the female plaintiff got on board the defendants' cars at Newton Corner, for the purpose of going to West Newton in an evening train; that she paid the fare to the conductor; that afterwards the conductor demanded the fare again; that she said she had before paid it; that the conductor told her she lied; that the conversation between them was in a loud tone; that the attention of people in the cars was attracted by it; that she was confused and shamed and excited by it; that the conductor demanded of her that she should give him her parasol to keep as security, or as payment for the fare; that she refused; that he took hold of it, and after somewhat of a struggle took it away from her; and that, by reason of this, the said plaintiff, a few days afterwards, was prematurely delivered of a child, and had suffered much in health.

"After the testimony for the plaintiffs was concluded, the judge announced to the counsel that at the conclusion of the case, whenever that should be, the rulings would be as follows; and that, after hearing them, the counsel upon one side or the other might proceed or not with the case to the jury, as they might

elect. These are the rulings: 'Upon the pleadings, the action is tort in the nature of trespass for an assault. In order to maintain the action, the plaintiffs must show that an assault was committed upon the female plaintiff. A conductor, by virtue of his implied authority as such, that being the only authority shown in this case, has no right to seize articles of property belonging to a passenger for the purpose of thus enforcing the payment of fare. And if a conductor does this, or attempts to do this, and, in so doing, and for the sole purpose of seizing such property, commits an assault on a passenger, the corporation is not responsible in trespass for such acts.' Upon the announcement of these rulings, with the foregoing statement made by the judge to the counsel, the plaintiffs' counsel consented to a verdict for the defendants."

GRAY, J. A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. Moore v. Fitchburg Railroad Co., 4 Gray, 465; Hewitt v. Swift, 3 Allen, 420; Holmes v. Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent; Howe v. Newmarch, 12 Allen, 49; or even if it is contrary to an express order of the master. Philadelphia & Reading Railroad Co. v. Derby, 14 How. 468.

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger for not paying fare. O'Brien v. Boston & Worcester Railroad Co., 15 Gray, 20. It has been adjudged by this court that if, in the exercise of his general discretionary authority, he wrongfully ejects a passenger who has in fact paid his fare; or uses excessive and unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or kick, or by compelling him to jump off while the train is in motion; in either case, the corporation is liable. Moore v. Fitchburg Railroad Co., Hewitt v. Swift, and Holmes v. Wakefield, above cited.

We are all of the opinion that this case cannot be distinguished in principle from those just mentioned. The use of unwarrant-

able violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use. for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured. In Monument National Bank v. Globe Works, 101 Mass. 59, Mr. Justice Hoar said, "No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable in this Commonwealth for one committed by its servants."

The ruling of the learned judge who presided at the trial, that if the conductor, in seizing, or attempting to seize, articles of property belonging to a passenger, for the purpose of thus enforcing the payment of fare, committed an assault upon the passenger, the corporation was not responsible for such acts, was therefore erroneous.

Verdict set aside.

ALLENDER v. CHICAGO, ETC., R. R. CO., 37 Ia. 264.

(1873)

Action to recover damages for injuries received by cars on defendant's road.

On the 5th day of November, 1870, the defendant operated a railroad in Jefferson county, and had a depot at Fairfield, which was then the terminal station of the road. About half-past four o'clock in the afternoon of that day plaintiff, a resident of Jefferson county, eighteen years of age, and who had never ridden on the cars, applied at the depot of defendant, in Fairfield, for passage to Acheson, the next station on the road.

She was informed by the ticket agent that the regular train had gone, but that a freight train would leave about 5 o'clock, which would have a car on which she could ride. She informed

the agent that she would rather go on that than wait for the passenger train, and then went to the house of an acquaintance near the depot.

In a short time she returned, went to the door of the ticket office, asked for a ticket, and inquired how long it would be before she could go. The agent informed her that the train would start in about twenty minutes; told her that she could pay her fare to the conductor, and that she had better go and get on the car and be ready. She told the agent that she had never ridden on the cars before, and asked him if they would not back up to the station. He said the regular passenger train did.

At the place in question the defendant's road had three tracks. The caboose stood on the track farthest from the depot, and about two hundred and fifty feet north of it. The engine stood up the track still farther north. To the rear or south end of the caboose was attached a flat car. The bunter of the flat car was out. About five feet south of the flat car stood a box car.

The ticket agent went with the plaintiff out on the platform over the first track to the middle track, in view of the caboose car, pointed it out with his finger, and directed her to go to it and get on.

The plaintiff passed north up the track until she came to the south end of the flat car, and then, seeing no means of entering the caboose car, as she supposed, she undertook to pass between the flat car and the box car, a few feet south of it, hoping to find an opening by which she might enter the car on the other side, first looking up and down the track, and discovering nothing in motion. At this time the brakeman and conductor were engaged in making up the train. Four freight cars detached from the locomotive, the conductor upon them, were very slowly coming down from the north to be attached to the caboose. When they came near the caboose the conductor got off and walked alongside to make the coupling. The concussion was slight, but was sufficient to carry the caboose and flat car far enough back to almost close the space through which the plaintiff was at that moment passing. She was caught between the flat car and the box car about the hips, and received the injuries for which she sues.

Jury trial. Verdict for plaintiff for $5,000. Motion for new trial overruled. Judgement upon the verdict. Defendant appeals.

The further material facts appear in the opinion.

DAY, J.: I. The first point urged by appellant is that there is no evidence of negligence on the part of defendant. This branch of the case is discussed as though the only acts upon which plaintiff can ground her right of recovery are those connected with the backing and coupling of the four freight cars, or the positive direction of the agent to plaintiff to go through the opening in the cars; and it is urged that the backing and coupling were conducted with skill and care, and that the agent did not direct plaintiff to go through the opening between the cars, as the evidence shows he did not see it.

Appellant, we think, places too narrow a construction upon the issue. The first count of the petition alleges that at the date of the injury plaintiff applied at the ticket-office in Fairfield for passage to Acheson, and placed herself in defendant's care as a passenger; that the agent received her as a passenger, directed her to go to the car, pointed out the way, and that she, in obeying such direction, passed across the track of said road, and, without her fault, and by negligence of defendant, was crushed between two cars and seriously injured. The immediate cause of her injury was the closing of the space between the box and flat cars when she was between them. If the space had not closed, or if plaintiff had not been in it, she would not have been injured in the manner she was.

Whether the injury is ultimately to be traced to the manner in which the four moving box cars came in contact with the caboose, or to the neglect to bring the train to the platform, or to the act of the agent in directing her to get on the car before the train was made up, or to the failure to have some one present to show her the way into the car, or to some other neglect or omission, the petition does not state. It alleges only that in obeying the agent's directions, she was, by the negligence of defendant, crushed between two cars and injured. The averment is broad enough to cover any act of negligence contributing to the injury. With this understanding of the issue, we are unable to say that the general verdict of the jury, attributing negligence to the defendant, is not supported by the evidence.

The plaintiff, a young woman, inexperienced in railway travel and unattended, applied for passage on defendant's cars. She was told she could go on a freight train, to which was attached

a car on which she could ride. When she asked if the cars would not back up to the station, she was told the regular passenger train did, and was directed to go and get in and be ready. twenty minutes before the train started, and whilst cars were switching on the tracks making up the train. She was thus sent across two tracks, two hundred and fifty feet north of the depot, to make her way into the caboose. The evidence shows that when this train was made up it was usual for the conductor to give the ticket agent a signal, so that passengers might then get on; and that about half the time the train backed down to the platform. If the agent had not directed plaintiff to get on the car until he received this signal, or if he had caused the train to come to the platform, or had accompanied plaintiff to the car, or had stationed some one there to show her the way to enter, it is not probable that the accident would have happened. Whether certain facts proved amount in a given case to negligence is usually a question of fact for the jury.

The defendant, through its agents, having omitted all of the precautions above named, we cannot say, as mere matter of law, that it was not guilty of negligence.

II. It is further urged that the plaintiff, by her own negligence, contributed to the injury. We do not, upon this branch of the case, feel justified in interfering with the verdict. If plaintiff, seeing the cars approach, or without looking for them, had undertaken to cross the track, and been injured, she would have been guilty of contributory negligence. Lodge v. The Burlington, C. R. & M. R'y Co., 34 Iowa, 276.

The evidence, however, is positive that when plaintiff came within about two feet of the opening she looked both up and down the track, and saw nothing moving. It is clear that at that time the four freight cars were in fact moving; but they were moving very slowly, and were coming almost directly toward her. It is an optical fact, to which the experience of all bears witness, that motion under such circumstances is not readily detected. A distant object may even rapidly approach a beholder, and yet appear to be standing still. And whilst the rapid motion of a near object would likely be detected, yet its motion, if very slow, might escape observation.

If to this be superadded the fact that the locomotive—the only thing which it would naturally be supposed would produce

motion of railroad cars—was seen standing far up the track, it is not at all improbable that plaintiff looked, as she testifies she did, and yet failed to discover any moving cars.

Seeing the locomotive standing far away, looking up and down the track and discovering no car in motion, we cannot say that she was, nevertheless, as matter of law, guilty of negligence in attempting, under such circumstances, to cross the track.

III. The court gave to the jury sixteen instructions, which, in the main, quite fairly present the case. To six of them the defendant makes objection. Some of them are exceptionable because they suggest to the jury matters outside of the evidence produced. * * *

The seventh instruction is as follows:

"If you believe that the plaintiff entered into an office or waiting room provided by defendant for passengers, and informed the depot or ticket agent of her intention and desire to become a passenger; that she placed herself, in good faith, under his direction as such; that such agent directed her in getting on (attempting to get on) the car; these facts, if established to your satisfaction by the evidence, would be sufficient to justify you in finding that the relation of passenger existed although she had not purchased a ticket, and had not entered a car." This instruction is not only right in principle, but it is supported by authority.

If the actual purchase of a ticket, or the entering of a car, is necessary in order to constitute the relation of a passenger, then no one taking passage on a railway at a way station where no tickets are sold, can demand of the company the exercise of that high degree of care which a common carrier owes a passenger, until he had actually obtained admission to the car. If the doctrine of the instruction be not right, then a person taking passage at a way station, without the means of procuring a ticket, might be precipitated under the wheels and injured, from a defect in the steps, and yet could demand of the company the exercise of only ordinary care.

The rule given by the court is distinctly recognized in Shearman & Redfield on Negligence, section 262, and cases cited, and we have no doubt of its correctness. * * *

The ninth instruction is as follows:

"It is the duty of a railroad company to use due care, not only in conveying its passengers upon the journey, but also in all preliminary matters, such as their reception into the car and their accommodation while waiting for it; and whether bound to render assistance in taking passengers aboard its cars or not, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering."

This instruction is almost in the exact language of passages contained in section 275 of Shearman & Redfield on Negligence. It is not urged that this instruction is inherently wrong, but that it is inapplicable to the issues. It is urged that the petition nowhere charges that there was negligence in giving directions as to the mode of entering the car.

We have before seen that this view of the issue is too narrow a one, that the charge is a general one, that plaintiff was injured by the negligence of defendant. The particular act of negligence is a matter of proof.

The tenth instruction is as follows:

"Whether or not it was the duty of defendants' agents to have assisted plaintiff in getting on the car is a question for you to determine (under the instructions here given) from the evidence in the case, and to this end it is proper for you to consider the train and the car, their distance from the platform and depot, the facility with which access could be had, the sex, age and inexperience of the plaintiff, if these were known to defendants' agents, and all the facts and circumstances surrounding the case." It is claimed that the fair meaning of this instruction is, that if the jury believe that the defendants' agents knew plaintiff was an inexperienced girl, and the car was some distance from the depot, then it was the duty of the agent to have escorted plaintiff to the car, and assisted her in getting on it.

The instruction does not, as we understand it, mean this. The jury are told that they are to determine from the evidence whether or not it was the duty of defendant to have assisted plaintiff in getting on the car. In Shearman & Redfield on Negligence, section 278, it is said: "The obligation of a carrier to assist passengers in getting on and off depends largely upon the nature of his vehicle, the facility with which access may be had without assistance, and similar circumstances."

The circumstances of this case were the following: Plaintiff had never ridden on the cars, and she so informed the defendants' agent. She was about to take passage on a freight train, to which was attached a car for the accommodation of passengers; it stood two hundred and fifty feet north of the depot, and on the third track therefrom; the train was being made up; plaintiff asked if it would not come to the platform; she was told to go and get on and be ready. Under these circumstances the jury are told, not that the inexperience of plaintiff and the distance of the train from the platform made it the duty as a question of law, for defendant to assist her on the train, but that these facts were proper to be considered by them, in determining the duty of defendant. In this sense the instruction seems to us unobjectionable. * * *

(For errors in other instructions). Reversed.

THE ILLINOIS CENT. R. CO. v. GREEN, 81 Ill. 19.

(1875)

Mr. JUSTICE SHELDON delivered the opinion of the court.

This was an action on the case, for personal injury to appellee whilst a passenger on the cars of appellant.

The appellee took the cars of appellant at Odin, in this State, giving south, at about nine o'clock in the evening of May 25, 1870. He was going to a place about seven miles east of Mt. Vernon, and took a ticket to Ashley, which is some five miles north of Little Muddy bridge. The accident occurred in getting off the train at this bridge. There was no station there, but there was a water tank, and it was a regular stopping place for supplying water to the engines, and for no other purpose.

Appellee's account of the affair is substantially as follows: * * * that after leaving Irvington he went to sleep again; that he heard the whistle, and no station announced, and then when the cars traveled along again he supposed they were going down grade, which he took to be a grade from Ashley to Richview, and he began to think he was reaching his station, and he inquired if they were coming to Ashley, and the response was, by passengers on the cars, that they had passed Ashley and were coming to the next station; that when the

cars became about still he stood up at his seat and looked back, and asked the passengers if they saw anything of the conductor on the car, and they remarked they did not; that he felt that he had been neglected, and went to the door, and, finding it unlocked, turned around and said, "Gentlemen, this is right, I suppose," and being answered in the affirmative, he then opened the door and went out on the platform: * * * that he put out his foot to reach the platform, if he could, and there being no platform as he expected, it gave him a jerk and pulled both feet off the car, and left him hanging by one hand; his weight pulled him loose, and he fell. * * *

We are of opinion the evidence in this case discloses no cause of action.

It is said there was negligence in carrying the appellee past his station.

Conceding all that is claimed in that respect, appellee would not, for such cause, be justified in jumping off the train, or otherwise needlessly exposing himself to injury, and then claim the liability of appellant for the injury he might receive in consequence. The injury here received had no proper connection with being carried past a destined station; and for such act, appellant cannot be held responsible for any such remote and unnatural consequence thereof, as the injury here sued for.

It is then insisted that the stoppage of a passenger car at such a place as the one in question, without some precaution to notify passengers of danger, was an act of gross negligence.

But why notify passengers of danger? It was a stopping place for getting water, not for passengers. The bridge was intended solely for the passage of cars, not for the alighting of passengers upon it. The place for the passenger, here, was inside, not outside of the car. The train, and the appellee in his proper place inside the car, were as safe upon the bridge as they would have been anywhere away from it. The fact that the cars were upon the bridge, involved no danger or risk to the passenger, so long as he remained in his right place, within the car.

There was a right to presume that the passenger would keep in his place inside the car. It was not to be anticipated that he would be getting off the car where he had no business to

do so, and that there was any necessity for providing against it.

It cannot be said that there was any invitation to appellee to alight where he did. The mere stopping of the train is not to be so regarded.

It may be inferred, from appellee's testimony, that he heard the whistle at the bridge. If so, it was not a signal of approach to a station. The testimony of the conductor, on that head, was: "They (brakemen) know where the tank is, and the engineer does not whistle in coming to it, with the exception that, once in a while, when the engineer sees the train is going by the tank, he will then give a little toot—whistle down brakes; don't know whether he whistled that night or not. There is a fixed whistle for down brakes, one short whistle, and is used on all portions of the line. They use the same whistle when they want to stop, except at regular stations they whistle a long whistle, and don't whistle any stop whistle at all. This short toot is used to apply the brakes between stations, where there is danger, when you want the train to stop at an irregular place where there is danger, or anything on the track, but in stopping regularly we don't use that at all."

Appellee testified that he was accustomed to travel on railways. He was not justified in taking the whistle as notice of approaching a station. Any encouragement to get off, which according to his testimony, he might have received from any passenger, of course, is not to be imputed to the company, as in any way its act. Appellee getting off the car where he did was an entirely uncalled for and voluntary act of his own, uninvited and unencouraged by anyone in the management of the train, and he took the risk of the consequences. The act of thus getting off in the darkness of night, at an unknown and dangerous place, was one of gross carelessness, whereby appellee exposed himself to the injury which he received. The harm which one brings upon himself, he is to be considered as not having received. So far as his relations to others are concerned, such harm is uncaused. Chicago and Alton Railroad Co. v. Becker, 76 Ill. 31.

Had appellee used ordinary prudence, the casualty would not have happened. Having failed in this, the company ought not to be liable. Chicago and Northwestern Railroad Co. v. Sweeney,

51 Ill. 331; and see Chicago and Alton Railroad Co. v. Gretzner, 46 id. 75; Chicago, Burlington and Quincy Railroad Co. v. Van Patten, 64 id. 511; Chicago, Rock Island and Pacific Railroad Co. v. Bell, 70 id. 103; Todd v. Old Colony, etc. Railroad Co. 3 Allen, 18; Louisville and Nashville Railroad Co. v. Sickings, 5 Bush, 1; Pittsburgh and Connellsville Railroad Co. v. Andrews, 39 Md. 329; 2 Redf. Am. Railway Cases, 552, in note to McClurg's case; The Indianapolis, etc., Railroad Co. v. Rutherford, 29 Ind. 82.

It is a requisite to the liability of a railway company, as a passenger carrier, that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury. 2 Redfield Railways, 22, 236.

The judgment must be reversed, there being no cause of action under the evidence.

Judgment reversed.

MARION v. CHICAGO, ETC., R. CO., 59 Ia. 428, 13 N. W. 415.

(1882)

Action to recover for a personal injury. The plaintiff avers in his petition that he climbed upon one of the defendant's freight trains while in motion; that he did so without a ticket and without the consent of the company; that one of the defendant's brakemen, in the course of his employment, negligently and willfully forced him from the train while in motion, and caused him to fall through a bridge, from which he received the injury complained of.

The defendant for answer denied all the allegations of the petition not admitted, and did not admit that one of its brakemen, in the course of his employment, negligently or willfully forced the plaintiff from the train. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, J. There was evidence tending to show that the conductor was vested with the sole power to determine who should be allowed to ride upon the train and who should be removed therefrom. Upon this point the defendant asked the

court to give an instruction in these words: "Acts done by an employe while engaged in the service of his employer are not necessarily done in the course of his employment as the term is used in law, and if an employe, while engaged in the service of his principal to perform a special service, goes beyond or outside the scope of his employment, and in doing so injures one to whom, like the plaintiff in this case, the employer owes no duty, the employer is not liable." The court refused to give this instruction, and gave an instruction in these words: "Even though the instructions and rules of the company placed the matter of the removal of trespassers, non-paying passengers, from the trains under the immediate charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because in this instance the brakeman acted without orders or direction from the conductor. But if the brakeman, not as a part of his duty as an employe of the defendant, but for the gratification of his own feelings, willfully or maliciously assaulted the plaintiff, and in this assault the plaintiff fell to the ground, then the defendant is not liable. The point you are to observe is this: that as the defendant owed the plaintiff no duty as a common carrier, therefore, unless the brakeman, as an employe of the company engaged in operating the train, acted for the purpose of putting him off and freeing the train from him as a trespasser, the defendant is not liable for this act." The giving of this instruction and the refusal to give the instruction asked are assigned as errors.

The rule is familiar that an employer is liable for the torts of an employe only where they are committed in the course of his employment. The difficulty has been to determine what acts should be deemed within the course of his employment. If in this case the conductor had forced the plaintiff from the train while in motion and while crossing a bridge, the act very clearly would, under the evidence, be deemed to be in the course of his employment, and that too even if it were shown that he had been expressly instructed to eject no person from the train when in motion, and especially when crossing a place as dangerous as a bridge. In one sense, the specific act would not be in the course of his employment, but his general employment to remove

trespassers from the train would be sufficient to render the company liable.

But it appears to us that the act of an employe of a railroad company in removing a trespasser from a train cannot be considered the act of the company, unless he was engaged generally to remove trespassers, or specifically to remove trespassers, or specifically to remove the particular trespasser. The court below appears to have thought otherwise. The instruction given proceeds upon the theory that where a person is employed to do one thing, and he volunteers to do another, his act shall nevertheless be deemed to be within the scope of his employment if his purpose was to serve his employer. But in our opinion the purpose of the employe is not in a case like the one at bar material. The court, we think, was misled by a distinction which has been drawn by courts in a different class of cases. Where the question is as to whether the employer is liable for a willful injury done by an employe it is sometimes important to inquire whether the employe's purpose was to serve his employer by the willful act. Illinois Central Railroad Co. v. Downey, 18 Ill., 259; Wright v. Wilcox, 19 Wend., 343; Moore v. Sanborn, 2 Mich., 519; Croft v. Alison, 4 B. & Ald., 590; Johnson v. Barber, 5 Gilman, 425; Foster v. Essex Bank, 17 Mass., 479. The rule is that an employer is not liable for a willful injury done by an employe, though done while in the course of his employment, unless the employe's purpose was to serve his employer by the willful act. Where the employe is not acting within the course of his employment, the employer is not liable, even for the employe's negligence, and the mere purpose of the employe to serve his employer has no tendency to bring the act within the course of his employment. Where a female servant having authority to light fires in a house, but not to clean the chimneys, lit a fire for the sole purpose of cleaning a chimney, it was held that her employer was not liable for an injury caused by her negligence in lighting the fire. Mackenzie v. McLeod, 10 Bing., 385. See also, Towanda Coal Co. v. Heenan, 86 Pa. St., 418.

In our opinion the court erred in the instruction given and in refusing the instruction asked by the defendant. Several other questions are presented, but in the view which we have taken

of the case they will probably not arise upon another trial. Reserved.[1]

GLEESON v. VIRGINIA MIDLAND RY. CO., 140 U. S. 435, 11 Sup. Ct. 859.

(1891)

This is an action for damages, brought in the Supreme Court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that in January, 1882, he was a railway postal-clerk, in the service of the United States Post Office Department; that on Sunday, the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Va., in a postal-car of the defendant, and over its road; that in the course of such run the train was in part derailed by a landslide which occurred in a railway cut, and the postal-car in which the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and a letter-box, three of his ribs being broken, and his head on the left side contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind, and led to his dismissal from his office, because of his inability to discharge its duties. Defense was made by the company under these propositions: That the landslide was caused by a rain which had fallen a few hours previous, and therefore was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal-car's letter-box, for which the company was not responsible, since he took the risk incident to his employment. The jury found for the defendant, and judg-

[1] Cf. Brevig v. Chicago, etc., R. Co., 64 Minn. 168; Penas v. Chicago, etc., R. Co., 112 Minn. 203.

Liability for failure to care for and protect passenger.—Wyman, Public Service Corporations, §§ 932-952, 978.

ment was rendered accordingly. That judgment having been affirmed by the court in general term, (5 Mackey, 356,) this writ of error was taken.

LAMAR, J., after stating the facts as above, delivered the opinion of the court.

It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three: (1) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a landslide, which occurred in a cut some 15 or 20 feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God;" but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In Dorman v. Ames, 12 Minn. 451, (Gil. 347,) it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. Ewart v. Street, 2 Bailey, 157, 162; Moffat v. Strong, 10 Johns. 11; Steam-Boat Co. v. Tiers, 24 N. J. Law, 697; Railway Co. v. Braid, 1 Moore P. C. (N. S.) 101. (2) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is

the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause landslides and consequent dangerous obstructions to the track itself from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the debris created by the common processes of nature is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the traveling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

In a late case in the Queen's Bench division,—Tarry v. Ashton, 1 Q. B. Div. 314,—two out of three judges declared in substance that a man who, for his own benefit, suspends an object, or permits it to be suspended, over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house from the front of which a heavy lamp projected several feet over the public foot pavement. As the plaintiff was walking along in November, the lamp fell on her, and injured her. It appeared that in the previous August the defendant employed an experienced gas-fitter to put the lamp in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron, or bracket, from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to

save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination, it was discovered that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this it was held by Lush and Quain, JJ., that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man man to repair it. 1 Thomp. Neg. 346, 347. The case of Kearney v. Railroad Co., L. R. 6 Q. B. 759, 762, (in the exchequer chamber,) cited in the brief of counsel for plaintiff in error, is directly in point. In that case the plaintiff had been injured while walking along a public highway, by a brick which fell from a pier of the defendant's bridge. A train had just passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court (Kelly, Chief Baron) says: "There can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The lord chief justice, in his judgment in the court below, said res ipsa loquitur, and I cannot do better than to refer to that judgment. It appears without contradiction that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. * * * The bridge had been built two or three years, and it was the duty of the defendants from time to time to

inspect the bridge, and ascertain that the brick-work was in good order, and all the bricks well secured." The principle of these decisions seems to us to be applicable to this case. If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, a fortiori must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung, from considerations of economy or through negligence. We think the case of Railroad Co. v. Sanger, 15 Grat. 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up alongside of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says: "Combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers. And, as accidents as frequently arise from obstructions on the track as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See, also, McElroy v. Railroad Corp., 4 Cush. 400; Hutch. Carr. p. 524; Bennett v. Railroad Co., 102 U. S. 577. This view of the obligation of the company of course makes it immaterial that the slide was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to remove the obstruction, but of negligence in allowing it to get there.

We are also of the opinion that it was error to refuse to modify the first instruction for the defendant as requested by the plaintiff. Since the decisions in Stokes v. Saltonstall, 13 Pet. 181, and Railroad Co. v. Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence

on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Coasting Co. v. Tolson, 139 U. S. —, ante, 653. The defendant seeks to uphold the action of the court in refusing the modification prayed for, by distinguishing the case at bar. It attempts to make two distinctions: (1) That the operation of the rule is confined to cases "where the accident results from any defective arrangement, mismanagement, or misconstruction of things over which the defendant has immediate control, and for the management, service and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railway company with respect to these matters entirely under its control." (2) That the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control, and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the prima facie

case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error. Judgment reversed, and cause remanded, with direction to order a new trial, and to take further proceedings not inconsistent with this opinion.[1]

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3. Rights of Common Carriers.

a. To Make Regulations.

TOWNSEND v. THE NEW YORK CENTRAL, ETC., R. R. CO., 56 N. Y. 295.

(1874)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

Grover, J. This action was brought by the plaintiff to recover damages for an assault upon and forcibly ejecting him from its car, at Staatsburg, a station on defendant's road between Poughkeepsie and Rhinebeck.

The jury by their verdict have found that the plaintiff purchased a ticket at the station at Sing Sing, for Rhinebeck; that with this ticket he went on board a train from New York, going no farther north than Poughkeepsie; that after this train passed Peekskill the conductor called for tickets and the plaintiff handed his to him, which he took and retained, giving to the plaintiff no check or other evidence showing any right to a passage upon any train of the defendant; nor did the plaintiff ask for a return of his ticket or for any such evidence. Upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited at the station until another train arrived from New York, which was going to Albany, stopping at Rhinebeck. The plaintiff got into and seated himself in this train; and after it

[1] Fisher v. The Southern Pac. R. Co., 89 Cal. 399 (1891).
Operating street cars during strike of employes.—Fewings v. Mendenhall, 83 Minn. 237.

started the conductor called upon him for his ticket; in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had taken and had not given back to him; some of the passengers told the conductor that the plaintiff had had such a ticket. The conductor told the plaintiff that it was his duty in case he had no ticket to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff still refusing to pay fare or leave the train upon request, was taken hold of and such force used as was necessary to overcome his resistance, and ejected from the car. This was the injury for which the recovery was had.

But there is another important question in the case which will necessarily arise upon a retrial, and which was raised by an exception taken upon the trial already had: that is whether the plaintiff had a right to go upon another train and use force to retain a seat there; refusing to pay fare, having no evidence of any right to a passage, by reason of the conductor of the other train having wrongfully taken and retained his ticket.

It is insisted by the counsel for the plaintiff that this question was decided in favor of the plaintiff in Hamilton v. Third Avenue Railroad Company, 53 N. Y. 25. This question was not involved or decided in that case. There the plaintiff testified that when the car upon which he had paid his fare to the City Hall stopped at an intermediate station, its conductor told the passengers to change cars; that before going on board the car from which he was ejected, he inquired of its conductor whether any transfer ticket was necessary; that the conductor told him it was not; that if he came from the other car he could go on board of the one from which he was ejected. This was equivalent to an assurance by that conductor that he could ride upon the car under his control, without further payment of fare or evidence of a right so to do. It was in reference to this testimony that it was said that the company would be liable for his wrongful ejection from the car by the conductor who had

given this assurance. But testimony was given by the defendant in direct conflict with this. The judge erroneously charged the jury that, assuming the truth of the latter testimony, and that the conductor acted in good faith in putting the plaintiff off the car, still he was entitled to recover of the company punitory damages if he had paid fare to the City Hall upon the other car. For this error the judgment was reversed and a new trial ordered by this court.

In Hibbard v. The New York and Erie Railroad Co. (15 N. Y., 455) it was held by this court that a railroad company had the right to establish reasonable regulations for the government of passengers upon its trains, and forcibly eject therefrom those who refused to comply with such regulations. Surely, a regulation requiring passengers either to present evidence to the conductor of a right to a seat, when reasonably required so to do, or to pay fare, is reasonable; and for non-compliance therewith such passenger may be excluded from the car. The question in this case is whether a wrongful taking of a ticket from a passenger by the conductor of one train, exonerates him from compliance with the regulation in another train, on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. For the wrongful act in taking his ticket he has a complete remedy against the company. The conductor of the train upon which he was was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor of the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as was rightly held by the trial judge, by putting the plaintiff off, in case he persistently refused to pay fare. The question is, whether under the facts found by the jury, resistance in the performance of this duty was lawful on the part of the plaintiff. If so, the singular case is presented, where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had the right to repel force by force and use all that was necessary to retain his seat in the car. Thus, a desperate struggle might ensue, attended by very serious consequences,

when both sides were entirely in the right, so far as either could ascertain. All this is claimed to result from the wrongful act of the conductor of another train, in taking a ticket from the plaintiff, for which wrong the plaintiff had a perfect remedy, without inviting the commission of an assault and battery by persisting in retaining a seat upon another train in violation of the lawful regulations by which those in charge were bound to govern themselves. It was conceded by the counsel, upon the argument, that one buying a ticket, say from Albany for Buffalo, which was wrongfully taken from him by a servant of the company, and who had once been put off for a refusal to pay fare, would not have the right to go upon other trains going to Buffalo, and if forcibly ejected therefrom maintain actions against the company for the injuries so inflicted. The reason why he could not, given by the counsel, was, that being once ejected was notice that he could not have a seat upon the ticket which he claimed had been taken from him. But when the conductor in charge of the train explicitly tells him that he cannot retain his seat upon that ticket, that he must pay fare or leave the car, does it not amount to the same thing? He then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor nor the company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.

The judgment appealed from must be reversed and a new trial ordered, costs to abide event.

Judgment reversed.

FREDERICK v. THE MARQUETTE, ETC., R. CO., 37 Mich. 342.

(1877)

Case. Plaintiff brings error. Affirmed.

MARSTON, J. This is an action on the case brought to recover damages for being unlawfully ejected and put off a train of cars by the conductor of the train. The evidence on the part of the plaintiff tended to show that on the evening of January 29th, 1876, he went to the regular ticket office of the defendant at Ishpeming and asked for a ticket to Marquette, presenting to the agent in charge of the office one dollar from which to make payment therefor; that the agent received the money, handed plaintiff a ticket and some change, retaining sixty-five cents for the ticket, the regular fare to Marquette; that plaintiff did not attempt to read what was on his ticket, nor did he count the change received back until next morning or notice it until then; that he went on board the train bound for Marquette, and after the train left the station the conductor took up the ticket, giving him no check to indicate his destination, but at the time telling him his ticket was only for Morgan; that when the train reached Morgan the conductor told the plaintiff he must get off there or pay more fare; that if he wanted to go to Marquette he must pay thirty-five cents more. Plaintiff insisted he had paid his fare and purchased his ticket to Marquette and refused to pay the additional fare, whereupon he was ejected from the train, etc. On the part of the defendant evidence was given tending to show that the ticket purchased and presented to the conductor was in fact a ticket for Morgan and not for Marquette. Under the pleadings and charge of the court other evidence in the case and questions sought to be raised need not be referred to, and as the real gist of the action was for the expulsion from the cars by the conductor, the above statement is deemed sufficient to a proper understanding of the case.

An erroneous impression seems to prevail with many that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to proceed farther, or upon that train, that the company is liable

in an action at law for all damages which the party may in any way have sustained in consequence of the delay, mortification, injury to his health or otherwise, and that the passenger is under no obligation to prevent or lessen the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. Although such damages were claimed in this case, under our present view it will be unnecessary to discuss this question any farther at present.

What then is the duty of the conductor in a case like the present? and what are the passenger's rights? In considering these questions we cannot shut our eyes to the manner and method which railroad companies and common carriers generally have adopted in order to successfully carry on their business. The view to be taken of these questions must be a practical one, even although it may work, perhaps, injustice in some special and particular cases, resulting however in great part if not wholly from other causes. In Day v. Owen, 5 Mich. 521, Mr. Justice Manning in speaking of the rules and regulations of common carriers, said "all rules and regulations must be reasonable and, to be so, they should have for their object the accommodation of the passengers. Under this head we include everything calculated to render the transportation most comfortable and least annoying to passengers generally; not to one, or two, or any given number carried at a particular time, but to a large majority of the passengers ordinarily carried. Such rules and regulations should also be of a permanent nature, and not be made for a particular occasion or emergency."

It is within the common knowledge or experience of all travelers that the uniform and perhaps the universal practice is for railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the pas- unhesitatingly of such tickets as evidence of the contract entered the contract, unless he relies upon the statement of the pas- known that the conductor has but seldom if ever any other senger is to be carried; that these tickets are presented to the into between the passenger and his principal. It is equally well means of ascertaining, within time to be of any avail, the terms of conductor or person in charge of the train and that he accepts senger, contradicted as it would be by the ticket produced, and that even in a very large majority of cases, owing to the amount

of business done, the agent in charge of the office, and who sold the ticket, could give but very little if any information upon the subject. That this system of issuing tickets, in a very large majority of cases works well, causing but very little, if any annoyance to passengers generally, must be admitted. There of course will be cases, where a passenger, who has lost his ticket, or where through mistake the wrong ticket has been delivered to him, will be obliged to pay his fare a second time in order to pursue his journey without delay, and if unable to do this, as will sometimes be the case, very great delay and injury may result therefrom. Such delay and injury would not be the natural result of the loss of a ticket or breach of the contract, but would be, at least in part, in consequence of the pecuniary circumstances of the party. Such cases are exceptional, and however unfortunate the party may be who is so situated, yet we must remember that no human rule has ever yet been devised that would not at times injuriously affect those it was designated to accommodate. This method of purchasing tickets is also of decided advantage to the public in other respects; it enables them to purchase tickets at times and places deemed suitable, and to avoid thereby the crowds and delays they would otherwise be subject to. Were no tickets issued and each passenger compelled to pay his fare upon the cars, inconvenience and delay would result therefrom, or the officers in charge of the train to collect fares would be increased in numbers to an unreasonable extent, while at fairs and places of public amusement where tickets are issued and sold entitling the purchaser to admission and a seat, we can see and appreciate the confusion which would exist if no tickets were sold, or if the party presenting the ticket were not upon such occasions to be bound by its terms.

How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if

true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyancce of the traveling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must procure it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case.

We have not thus far referred to any authorities to sustain the views herein taken. If any are needed the following, we think, will be found amply sufficient, and we do not consider it necessary to analyze or review them. Townsend v. N. Y. C. &. H. R. R. R. Co. 56 N. Y. 298; Hibbard v. N. Y. & E. R. R. 15 N. Y. 470; Bennett v. N. Y. C. & H. R. R. 5 Hun. 600; Downs v. N. Y. & H. R. R. 36 Conn. 287; C. B. & Q. R. R. v. Griffin, 68 Ill. 499; Pullman P. C. Co. v. Reed, 75 Ill. 125; Shelton v. Lake Shore, etc., Ry. Co. 29 Ohio St. 214.

I am of opinion that the judgment should be affirmed, with costs.

COOLEY, C. J., concurred.

GRAVES, J. By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained and paid for; and having ridden under it the distance which it authorized and refusing to repay for the space beyond, the plaintiff was removed from the cars.

This removal may or may not have constituted a cause of action, but it is not the cause of action charged. The declaration sets up that plaintiff's ticket was a proper one for the whole distance and that he was removed in violation of the right which the ticket made known to the conductor.

There was no proof of the case alleged, and I agree therefore in affirming the judgment.

CAMPBELL, J. The plaintiff's cause of action in this case was for the failure of the company to carry him to a destination to which he had paid the passage money, and the immediate occasion for his removal from the cars was that he was given a wrong ticket, and was not furnished with such a one as the conductor was instructed to recognize as entitling him to the complete carriage. His declaration should have been framed on this theory. Had it been so framed I am not prepared to say that he may not have had a right of action for more than the difference in the passage money.

But as he counted on a failure of the conductor to respect a correct ticket, and it appears that the conductor gave him all the rights which the ticket produced called for, there was no cause of action made out under the declaration, and the rule of damages need not be considered. I concur in affirming the judgment.

SWAN v. MANCHESTER & LAWRENCE R. R.,

132 Mass. 116.

(1882)

Tort in two counts. The first count was for expelling the plaintiff from the defendant's cars at Windham, in the State of New Hampshire. The second count was for refusing to sell the plaintiff a ticket entitling him to be carried over the defendant's railroad from said Windham to Lawrence, in this commonwealth. The case was submitted to the Supreme Court, and, after judgment for the defendant, to this court on appeal, upon agreed facts, the material parts of which appear in the opinion.

DEVENS, J. The regulation that all passengers, who shall purchase tickets before entering the cars of a railroad company to be transported therein, shall be entitled to a small discount from

the advertised rates of fare, but, if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable one, and in no way violates the rule, which in New Hampshire has the sanction of the statute law, that the rates shall be the same for all persons between the same points. Commonwealth v. Power, 7 Met. 596. Johnson v. Concord Railroad, 46 N. H. 213. St. Louis, Alton & Terre Haute Railroad v. South, 43 Ill. 176. Illinois Central Railroad v. Johnson, 67 Ill. 312. Indianapolis, Peru & Chicago Railroad v. Rinard, 46 Ind. 293. Du Laurans v. St. Paul & Pacific Railroad, 15 Minn. 49.

The number of persons carried, the rapidity with which the cars move, the frequency and shortness of their stops, the delay and inconvenience of making change, the various details to be attended to by the conductor while the train is in motion or at stations, and the importance to the railroad company of conducting its business at fixed places, render the mode of payment by tickets previously purchased one of advantage to the railroad company and of convenience to the public. A passenger who is without a ticket and declines to pay full fare may ordinarily be ejected from a train at a station, as one who absolutely refuses to pay his fare. State v. Goold, 53 Maine, 279. Stephen v. Smith, 29 Vt. 160. Hilliard v. Goold, 34 N. H. 230, and cases above cited.

These positions are not controverted by the plaintiff, who maintains that, although he had no ticket, he was entitled to be carried for the price of one, in view of his failure to procure one under the circumstances hereafter stated. The table of prices advertised by the defendant authorized the ticket seller to make a discount of fifteen cents, had the plaintiff purchased one for the journey he proposed to make from Derry to Lawrence, the advertised fare being sixty-five cents. Until the time advertised for the departure of the train from Derry had expired, the ticket seller had been in his office. He left it after that time, and while the train was approaching, in order to aid the station agent, as he was accustomed to do, in loading the baggage upon the passenger trains. While the plaintiff did not approach the ticket office to find it vacant and the ticket seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have procured his ticket before the train actually started from the station, if the

ticket seller had then been in the office. He entered the train without a ticket, and the conductor, acting according to the rules of the company, demanded the full price for the fare, sixty-five cents, which the plaintiff refused to pay, insisting upon his right to be carried for fifty cents, the price of a ticket, which he tendered, but which the conductor refused, telling the plaintiff he must leave the train at the next station, unless the demand for full fare was complied with. On the arrival of the train at the next station the plaintiff, failing to comply with the demand of the conductor, was ordered by him to leave the train, which he did.

Upon this part of the case, the plaintiff contends that inasmuch as he went into the office to procure a ticket, and was unable to so do, as above stated, he was entitled to be carried for the price of a ticket, which he tendered, and that his exclusion from the train was therefore unjustifiable.

It has been held in a few cases that the offer to carry passengers at a less rate if tickets were procured, was in the nature of a proposal, like other proposals to enter into a contract, dependent for its acceptance upon the compliance with its condition; that it might be withdrawn at any time; that closing the office for the sale of tickets was such withdrawal; and that the offer carried with it no obligation on the part of the company to open an office, or to keep such office open for any length of time, it being merely an offer to make the deduction if the ticket should be procured. Crocker v. New London, Willimantic & Palmer Railroad, 24 Conn. 249, Bordeaux v. Erie Railway, 8 Hun. 579.

In a much larger number of cases, and with much better reason, it has been held that where the railroad undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets. St. Louis, Alton & Terre Haute Railroad v. South, ubi supra. Chicago & Alton Railroad v. Flagg, 43 Ill. 364. Jeffersonville Railroad v. Rogers, 28 Ind. 1. Indianapolis, Peru & Chicago Railroad v. Rinard, ubi supra. Du Laurans v. St. Paul & Pacific Railroad, ubi supra.

Adopting on this part of the case the rule most favorable to the plaintiff, he was afforded a fair and reasonable opportunity to obtain a ticket. Delays must necessarily from time to time arise in the progress of a train from a variety of incidental circumstances, but at the stations everything may be definitely arranged with reference to the time when by the schedule the train is to depart. A traveler should be at the station sufficiently early to make the ordinary preparation for his journey according to this, and has a right to expect that other matters in which he is interested will be accommodated to the schedule arranged; that suitable persons will then be at the station to take charge of his baggage and to provide him with a ticket. The plaintiff had a reasonable opportunity to procure a ticket, if for a time sufficient to attend to the business, and up to the time when the train was advertised to depart, the ticket office was open and there was a proper person in attendance. The delay of the train did not enlarge his rights, nor could it entitle him to insist that at the station whence he was to start the office of the ticket seller should not be closed until after its arrival. Trains may be delayed for hours, especially during the storms of winter, from causes which cannot be controlled. The ticket sellers, especially at the numerous small stations, must have imposed upon them various other duties; and it would not be a reasonable rule that should compel them to be at their posts sometimes for hours after the time when everything at the station should have been arranged for the departure. St. Louis, Alton & Terre Haute Railroad v. South, ubi supra.

The cases of Porter v. New York Central Railroad, 34 Barb. 353, Nellis v. New York Central Railroad, 30 N. Y. 505, and Chase v. New York Central Railroad, 26 N. Y. 523, all depend upon a statute of New York applicable to the New York Central Railroad Company alone, which requires it, at every station on its road where there is a ticket office, to keep the same open "at least one hour prior to the departure of each passenger train from such station." This has been held to mean its actual departure, and that road is necessarily governed by this positive provision of law.

The plaintiff, having no right to insist on being carried for the price of a ticket, and declining to pay the regular fare, was

properly expelled from the train on its arrival at Windham, one of the stations on the road.

While the train stopped at Windham, and after the plaintiff's expulsion therefrom, he applied to the ticket seller for a ticket from Windham to Lawrence, tendered him the money therefor, which the ticket seller accepted, but upon being informed of the fact by the conductor that the plaintiff had taken passage at Derry, and requested not to sell him a ticket, declined so to do, and tendered to the plaintiff his money, which the plaintiff declined to receive, at the same time stating "that he wished to go on that train." Under the direction of the conductor, the train started, leaving the plaintiff at the station, and he proceeded thence to Lawrence by carriage, a distance of twelve miles, there not being another train until five hours later.

If his original expulsion from the train were lawful, the plaintiff contends, on these facts, that the railroad company has no justification for refusing thereafter to transport him to Lawrence. The plaintiff did not seek to purchase a ticket from Windham, or offer the money therefor, except to prosecute his journey to Lawrence by the same train, which he had entered at Derry, and from which he had been rightfully expelled. Because tickets are sold from Windham to Lawrence, he contends that he desired to make a new contract at the regular price from that point, which the defendant, as a common carrier of passengers, had no right to refuse. Whatever might be his rights, if he had sought to purchase a ticket for or go by a subsequent train from Windham, he sought to continue a transaction which had begun by his entering the cars at Derry to go to Lawrence, when he had thus impliedly contracted to pay the regular fare for that journey, which included the distance from Windham. He was not in the situation of a passenger whose journey was to commence at Windham; he had already been brought from Derry, and the claim that he should have been carried by the same train from Windham, on paying from that point, was a claim that he might renew the same contract he had already broken, by paying for the distance over which the journey was yet to be prosecuted, while he made no payment for the distance over which he had already been transported. While the journey which he had begun and for which he had contracted to pay continued, he

could not at his pleasure break it into two separate transactions. That which he sought to make had been included in his original contract, and the defendant was not obliged to readmit him to the same train, from which his expulsion had been proper, so long at least as he persisted in his violation of the contract he had originally made.

In O'Brien v. Boston & Worcester Railroad, 15 Gray, 20, it was held that a person, who had been properly ejected for non-payment of fare at a place where there was no station, could not, by again entering the cars and tendering the fare, obtain the right to be carried by them.

If this case is distinguishable, as the plaintiff suggests, by the fact that the expulsion there was not at a station, and the re-entry into the cars was at a place where the company was not bound to receive passengers, it is also distinguishable, and in this matter not in favor of the plaintiff, by the fact that the person there expelled offered to pay the entire fare for the journey which he had begun.

If the rightful expulsion take place at a station, it is not an unreasonable rule that the person expelled should pay the fare over the distance already traveled before he can purchase a ticket from such station for the remainder of the journey which will entitle him to be carried on the same train. This point was directly adjudged in Stone v. Chicago & Northwestern Railroad, 47 Iowa, 82, and in O'Brien v. New York Central & Hudson River Railroad, 80 N. Y. 236.

The case of State v. Campbell, 3 Vroom, 309, goes further than we are required to do in the present inquiry. The traveler there had an excursion ticket from New Brunswick to New York, good for a single day, which had passed, and the ticket was thus exhausted. He had also a regular ticket, which then entitled him to a passage between the same points. The latter ticket he kept in his pocket, refused to exihibit any other than the exhausted ticket, and was ejected from the cars at Newark, a station on the road. He then exhibited the regular ticket, which would have entitled him to the passage if previously shown, and claimed to re-enter the cars. His previous conduct was held to fully justify his exclusion from the same train. * * *

Judgment affirmed.

BRADSHAW v. SOUTH BOSTON R. R. CO., 135 Mass. 407. (1883)

Tort for being expelled from one of the defendant's cars.

The defendant is a common carrier of passengers, for hire, owning lines of street cars between South Boston and Boston proper, and, among others, one running over the Federal Street Bridge, between Boston and City Point in South Boston by what is called the Bay View route, and another running over Dover Street Bridge between Boston and said City Point by way of Broadway. * * *

In the afternoon of May 15, 1881, the plaintiff entered one of the Bay View cars of the defendant at the corner of Eighth Street and Dorchester Street in South Boston, intending to go to the Corner of Dover Street and Washington Street in Boston, and thence over the Metropolitan Horse Railroad to some point on that line. He paid his fare on the defendant road, and also sufficient to pay for a transfer check to the Metropolitan road which he received in due form. He told the conductor that he wished for a check to take him over the Dover Street line, which the conductor promised to give him when they arrived at the proper place for changing cars. At the corner of Dorchester Avenue and Broadway he left said car, and, as he left, the conductor handed him the last-named check, by mistake, in place of the first-named. After waiting a short time, a Dover Street car came along, which he entered, and rode as far as the bridge, when the conductor of the car came for his fare, and he tendered him said check. The conductor refused to accept it, (though the plaintiff informed him of the circumstances under which he received it, as above stated,) and required him to pay a fare, or leave the car. The plaintiff refused to pay a fare, and was forced by said conductor to leave the car. No unnecessary force was used.

Upon these facts, the judge ruled that the plaintiff was not entitled to maintain his action, and found for the defendant.

C. ALLEN, J. It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract to give him a check showing that he was entitled to travel in the second car, and that it failed to do so; in consequence of which he was forced to leave the second car. It does not appear

that the defendant had any rule requiring conductors to eject passengers under such circumstances. We may, however, take notice of the fact that it is usual for passengers to provide themselves with tickets or checks, showing their right to transportation, or else to pay their fare in money. It was the practice for passengers on the defendant's road to receive and use such checks; and the plaintiff intended to conform to this practice.

The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant for the passenger who has once paid to submit to an additional exaction. But, unless the law hols him to do this there arises at once a conflict of rights. His right to transportatin is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car.

This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary.

Judgment for the defendant.

EVERETT v. CHICAGO, ETC., R. CO., 69 Ia. 15, 28 N. W. 410.

(1886)

On the morning of August 18, 1881, the plaintiff took passage on defendant's railroad at a small station named Weston, in-

tending to travel to Council Bluffs, a distance of 10 miles. He did not procure a passenger ticket, and the conductor of the train demanded 10 cents in addition to the ticket rate, which the plaintiff refused to pay. Thereupon the conductor caused the train to be stopped, and he forcibly ejected the plaintiff therefrom. This action was brought to recover damages for the alleged wrongful act of the conductor in removing the plaintiff from the train. A trial by jury resulted in a verdict and judgment for the defendant. Plaintiff appeals.

ROTHROCK, J. 1. It is provided by section 2 of chapter 68 of the Laws of 1874 (Miller's Code, 347) that "a charge of ten cents may be added to the fare of any passenger, where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train." The ground upon which the plaintiff based his refusal to pay the 10 cents demanded by the conductor was that he was prevented from procuring a ticket because the ticket office was closed when he presented himself for the purpose of purchasing a ticket. The facts are that the plaintiff is the owner of a large farm some five miles from Weston. His residence is at Council Bluffs, and he made frequent visits to his farm, going by rail by the way of Weston. He knew that the defendant was authorized to collect 10 cents, in addition to the ticket rate, from passengers who neglected to purchase tickets at the station. Weston is a small and unimportant station at which an inconsiderable amount of business is done by the railroad company, either in freight or passenger traffic. As is usual at such places, the company keeps no assistant for the agent; and, when a train arrives, the agent leaves the ticket office, and goes upon the platform of the station to transact his business with the train; such as seeing to the loading of the mail on the train, the receipt and delivery of baggage and express packages, and the like. The plaintiff came in from his farm in the morning, and stopped at a store in the village until he heard the whistle of the train as it approached the station, when he went to the station, and arrived there just before the train came to a full stop. The ticket agent had the office open for a considerable time before the train arrived, and sold tickets to passengers, and he did not leave the office until the engine to which the train was attached had passed the office window, when he went on the platform to attend to his train

duties. The train stops at that station only long enough to do the train business and allow passengers to get on and off the cars.

The court permitted all these facts to be shown to the jury, and charged the jury to the effect that if, under all these facts and circumstances, a reasonable time was given to passengers to purchase tickets before the departure of the train, the conductor was authorized to demand the extra 10 cents of the plaintiff. * * *

Counsel for appellant insist that this and other instructions given by the court to the jury are erroneous. They claim that, under a proper construction of the statute above cited, it was the duty of the railroad company to keep its ticket office open up to the time of the departure of the train; in other words, they claim that by the very terms of the statute the office must be kept open for the sale of tickets just so long as it is possible for passengers to purchase tickets, and board the train. Assuming this to be the meaning and intent of the statute, they contend that it was error for the court to submit to the jury the question whether, under the facts the office was kept open a reasonable time in which passengers might procure tickets. We do not think this position is sound. In our opinion, it was proper to allow the defendant to introduce evidence of the character of the station, and whether the facilities extended to the traveling public to purchase tickets were such as were required for the convenience of the public. It would be a most unreasonable requirement to impose upon the defendant the burden of employing two persons to attend to the station in order that the ticket office may be kept open for the one or two minutes which a train is required to stop at such a station, in order to accommodate the exceptional cases of passengers who may for any reason arrive at the station after the arrival of the train. Regard must be had to the orderly transaction of the business of the station, taking into consideration the necessary and proper facilities extended to persons having occasion to travel on the trains or transact other business with the company. It is absolutely necessary that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with

each other. But the language "before the departure of the train" does not require that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up to the very moment when the wheels began to move?

2. Some complaint is made as to the place where the plaintiff was ejected from the cars. It appears that it was half a mile from a public crossing. It is not required in this state that, where a person may rightfully be ejected from a railroad train, it must be done at a station or public crossing. Brown v. Railroad Co., 51 Iowa, 235; S. C., 1 N. W. Rep. 487. In the case at bar all of the facts attending the removal of the plaintiff from the train, and the place where he was removed, were fairly submitted to the jury on what we regard as proper instructions; and the jury, in answer to a special interrogatory, found that the conductor did not act with malice, express or implied, towards plaintiff in ejecting him from the train. We think this finding was fully supported by the evidence. * * *

We think the judgment of the district court should be affirmed.

BOYLAN v. HOT SPRINGS R. CO., 132 U. S. 146., 10 Sup. Ct. 50.

(1889)

In error to the circuit court of the United States for the northern district of Illinois. This was an action of assumpsit against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor. The plaintiff testified that he purchased a ticket for a passage to Hot Springs and back, which, was then signed by him as well as by the ticket agents, and witnessed by a third person, and upon this ticket traveled on the defendant's railroad to Hot Springs. He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the court. * * * The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him, and, upon being shown his ticket, said it

was not good because he had failed to have it stamped at Hot Springs. The plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he did not know it was necessary. The conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, and, upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health. On motion of the defendant, upon the grounds, among others, that this was an action of assumpsit for breach of contract, and that until the plaintiff identified himself at the office at Hot Springs, and had the ticket stamped and signed by the agent there he had no subsisting contract between himself and the defendant for a return passage to Chicago, the court directed a verdict for the defendant. The plaintiff excepted to the rulings of the court, and, after verdict and judgment for the defendant, sued out this writ of error.

MR. JUSTICE GRAY, after stating the facts as above, delivered the opinion of the court.

This is an action of assumpsit, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs; and no agent or employe of the defendant was authorized to alter, modify, or waive any condition of the contract. Neither the action of the baggagemaster in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conductor did not inform him of its amount is immaterial. The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs. There being no such contract in force, there could be no breach of it; and, no breach of contract being shown, this action of assumpsit, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train. The plaintiff, therefore, had not been prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion, and the consequent injuries to him or his business. The case is substantially governed by the judgment of this court in Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. Rep. 1324, and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several states. See, besides the cases cited at the end of that judgment, the following: Churchill v. Railroad Co., 67 Ill. 390; Petrie v. Railroad Co., 42 N. J. Law, 449; Pennington v. Railroad Co., 62 Md. 95; Rawitsky v. Railroad Co., 40 La. Ann. 47, 3 South. Rep. 387. Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff, and otherwise essentially different from the case at bar. In Jennings v. Railway Co., L. R. 1 Q. B. 7, the by-law required every passenger to obtain a ticket before entering the train, and to show and deliver up his ticket whenever demanded. The plaintiff took a ticket for himself, as well as tickets for three horses and three boys attending them, by a particular train, which was afterwards divided into two, in the first of which the plaintiff traveled, taking all the tickets with him; and when the second train was about to start the boys were asked to produce their tickets, and, being unable to do so, were prevented by the company's servants from proceeding with the

horses. An action by the plaintiff against the company for not carrying his servants was sustained, because the company contracted with him only, and delivered all the tickets to him; and Lord Chief Justice Cockburn, with whom the other judges concurred, said: "It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage." In Butler v. Railway Co., L. R. 21 Q. B. Div. 207, the ticket referred to conditions published by the company, containing a similar by-law, which further provided that any passenger traveling without a ticket, or not showing or delivering it up when requested, should pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when demanded, and, refusing to pay such fare, was forcibly removed from the train by the defendant's servants. The court of appeal, reversing a judgment of the Queen's Bench division, held the company liable, because the plaintiff was lawfully on the train under a contract of the company to carry him, and no right to expel him forcibly could be inferred from the provisions of the by-law in question, requiring him to show his ticket or pay the fare; and each of the judges cautiously abstained from expressing a decided opinion upon the question whether a by-law could have been so framed as to justify the course taken by the company.

Judgment affirmed.

BARRETT v. MARKET STREET RAILWAY, 81 Cal. 296.

(1889)

Action for damages for forcible ejection. Plaintiff tendered conductor of the defendant a five-dollar gold piece for a five-cent fare. The conductor refused it and thereupon ejected the plaintiff from the car.

PATTERSON, J. * * * The question on the merits to which counsel have mainly directed their arguments is, whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But

we do not think so. The fare can be demanded in advance as well as at a subsequent time. Civ. Code, sec. 2187. And so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Civ. Code, sec. 2169. This duty, like every other which the law imposes, must have a reasonable performance. And we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that, on entering a street car, a person should tender the sum of ten cents. Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was six and a quarter cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The act of 1878 forbids him to "charge or collect a higher rate than five cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at four and a quarter cents. And in such case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

But it does not follow that the passenger may tender any sum, however large. If he should tender a hundred-dollar bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish

a reasonable amount of change must be considered as one which the law imposes from the nature of the business.

Judgment for plaintiff.

MORRILL v. MINNEAPOLIS STREET R. R. CO.,

103 Minn. 362.

(1908)

ELLIOTT, J. This action was brought against the Minneapolis Street Railway Company to recover damages alleged to have been caused by the wrongful and illegal expulsion of the plaintiff from one of its cars. The jury returned a verdict in favor of the plaintiff for $100 and the appeal is from an order denying a motion for judgment for the defendant notwithstanding the verdict or for a new trial.

There was evidence tending to show that on September 5, 1906, the plaintiff entered one of the defendant's cars of the Interurban line near the Great Western depot on Washington avenue South in the City of Minneapolis. The car was crowded. The conductor collected from her a fare of five cents, which entitled her to be carried as a passenger to the end of any line of cars to which she was entitled to be transferred as provided by the city ordinances. The Interurban line of cars crossed the line known as the Eighth & Central at Hennepin Avenue and this was a regular transfer point from one line to the other. As the Interurban car approached Hennepin Avenue, the plaintiff, with a number of other passengers, moved towards the rear end of the car, where the conductor was handing out transfer slips to those who were about to alight. She asked the conductor for a transfer to the Eighth & Central line, and in response to such request he gave her a transfer which she accepted without examination. She then passed hurriedly across the street and entered a car which was standing at the crossing. The conductor intended to give her a transfer which would entitle her to ride on the car which she entered, but when it was presented on the Eighth & Central car the conductor refused it, and, upon her refusal to pay another fare, ejected her from the car. When she

[1] Nye v. M. & Y. St. Ry., 97 Cal. 461.

presented the transfer, the conductor examined it and said, "This is no good," after which he tore it up and threw it upon the floor. * * *

The right of a street railway company to make reasonable rules to facilitate its business and protect itself from imposition and fraud is questioned by no one. If such rules do not impose unreasonable and unnecessary burdens and restrictions upon the public, and are consistent with the rights of the public to transportation, they will be enforced by the courts. Clark, Accident Law § 81; Booth, Street Railway Law, § 337; Nellie, Street Surface Railroads, § 8; 4 Elliott, Railroads (2d ed.) § 1576. It is also conceded that a rule which requires transfer checks is reasonable. * * *

Numerous cases upon both sides of the controversy and illustrating its various phases will be found collected in a note to Springer v. Tacoma (15 Wash. 860, 47 Pac. 17) in 43 L. R. A. 706. Regardless of minor differences of theory, these cases fall naturally into two groups, one of which places the primary stress upon the right of the passenger, while the other emphasizes the importance of protecting the right of the carrier to make and enforce reasonable rules and regulations for the orderly and profitable conduct of its business. Probably the leading case of the first group or class is Bradshaw v. South Boston, 135 Mass. 407, 46 Am. 481. * * *

It is apparent that the tendency at present is towards the recognition of the right to sue in tort. As said by a recent writer: "The weight of authority in the courts, state and national, however, now is to the effect that the passenger has a right to rely upon the acts and statements of the ticket agents or conductors, and that if expelled from the train when he has acted in good faith and is without fault, the carrier will be liable in damages for such expulsion, whether the action is brought for a breach of the contract or solely for the tort of the conductor." Moore, Carriers, p. 743. To the same effect, see 6 Cyc. 557; note to 4 Street Ry. Rep. 234; 3 Wood, R. § 349. Contra: 4 Elliott R. (2d ed.) §§ 1594, 1602.

The following cases illustrate the application of this general rule and state the reasons upon which it rests: In New York, Lake Erie & W. R. Co. v. Winter's Admr., 143 U. S. 60, 12 Sup.

Ct. 356, 36 L. Ed. 71, it appeared that the plaintiff purchased a ticket to A., and at the time informed the agent that he wished to stop over at an intermediate station. The ticket agent instructed him to speak to the conductor about the matter. Before reaching the station where he desired to stop, the passenger informed the conductor that he wished to stop over; and the conductor, instead of giving him proper evidence of his right, merely punched his ticket and returned it to him with the statement that the conductor on the next train would accept it. The punched ticket was tendered on the next train, with a statement of what had occurred; but the conductor refused to accept it, and upon declining to pay another fare the passenger was required to leave the train. In an action to recover damages it was held that the passenger was rightfully on the train, and that the company was liable in tort for damages resulting from the act of the conductor in ejecting him. "If he was rightfully on the train as a passenger," said Mr. Justice Lamar, "he had the right to refuse to be ejected from it and to make a sufficient resistance to being put off to denote that he was being ejected by compulsion and against his will; and the fact that under such circumstances he was put off the train was of itself a good cause of action against the company, irrespective of any physical injury he may have received at that time or which was caused thereby." See 12 Rose's Notes on U. S. Reports, p. 110.

The claim that the ticket is the only evidence of the passenger's right to ride was carefully considered in Burnham v. Grand Trunk, 63 Me. 298, 18 Am. 220. The plaintiff purchased a ticket to N., which bore the endorsement, "Good for this day only." In the absence of any other evidence, this would have been proof of a contract for transportation on a train which went through on that day. But the plaintiff proved a different contract made with the ticket agent at the time of the purchase of the ticket. In accordance with this oral contract he stopped over at an intermediate station and took a train the next day, from which he was ejected because of the recital on the face of the ticket. * * *

"In the case at bar the inquiry presented is: "What is the contract? Not whether the rule of the company, or the contract expressed by the ticket, is reasonable. No objection is made to the authority of the company to make such a rule or

contract. But did the plaintiff have such a knowledge of the rule as to make it binding upon him, or did he in any way assent to it as a part of the contract for his passage from South Paris to Northumberland? As either party may prove terms of the contract not expressed upon the ticket, so either party may prove the acceptance, or rejection, or waiver of any terms endorsed thereon. The ticket is not a written contract signed by the parties. It is at most evidence of some existing contract for a passage between two places named and that the holder has paid the fare demanded." * * *

The notion that the carrier can substantially relieve himself from responsibility for the wrongful act of one of its agents by asserting the duty of another of its agents to enforce a reasonable rule for the conduct of its general business was repudiated in Sloane v. Southern, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. It there appeared that the plaintiff purchased a ticket from North Pomona to San Diego. Before reaching San Bernardino, where it was necessary to change cars, the conductor took up the ticket without giving the passenger any evidence of her right to continue the trip on the other train. The next conductor ejected her, because she had no ticket, and it was held that she might recover damages therefor. "If the conductor who took up the ticket," said the court, "had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding for its own convenience it has entrusted the management of its trains to different conductors. Muckle v. Rochester Ry. Co., 79 Hun. 32, 29 N. Y. Supp. 732. The plaintiff was not called upon to question the right of the first conductor in taking up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to a passage upon its cars." * * * Head v. Georgia, 79 Ga. 358, 7 S. E. 217, 11 Am. St. 434; Hornesby v. Georgia, 120 Ga. 913, 48 S. E. 339; Louisville v. Gaines, 99 Ky. 411, 36 S. W. 174, 59 Am. St. 465; Hot Springs v. Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. 913; Little Rock v. Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97; Laird v. Pittsburg, 166 Pa. St. 4, 31 Atl. 51.

There is ample authority for the rule that the burden of inspecting the transfer slip and seeing that the conductor has prop-

erly punched it cannot be thrown upon the passenger. Gulf. v. Copeland, 17 Tax. Civ. App. 55, 42 S. W. 239; O'Rourke v. Street, 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. 639; Indianapolis v. Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. 261.

The ordinance of the city of Minneapolis, approved April 11, 1892, provides that the street railway company shall issue transfer checks at the junction of its street railway lines in said city of Washington and Hennepin avenues, in said city, to any passenger on any of said lines who shall pay one full fare, which transfer check shall (subject to certain provisions not here material) entitle the passenger so receiving the same to a continuous passage on either of said connecting lines. By section 2 of the ordinance it is provided that the company shall pay to the city the sum of $50 for each time it refuses to so issue a transfer check and for each time it refuses to honor the same by carrying any passenger so entitled thereto on any connecting lines. The ordinance thus makes it the duty of the street railway company to furnish a proper transfer, and this duty cannot be shifted by it to the passenger by any rule or principle which requires the passenger to see that the transfer is properly made out. The check is nothing more than a token, which the passenger is instructed by the carrier to take to the next conductor. It is not a contract between the company and the passenger, by which the company is to carry the passenger the remainder of his journey subject to conditions printed thereon. The contract is made when the fare is paid. It is then complete.

Nothing printed on the transfer check which is contrary to the provisions of the ordinance can have any force and effect. ***

A person trained in the study of statistical tables and tabulated data can, of course, ascertain within a reasonable time whether the slip entitles him to ride on the desired car; but an ordinary person of fair intelligence, good eyes, and a reasonable amount of patience requires more leisure for the purpose than is available during the hurried emptying of an overcrowded car, with a conductor standing on the rear platform passing out the slips to all comers. It is the duty of the conductor, not of the passenger, to see that a proper transfer slip is issued.

The wrong which resulted in the expulsion of the plaintiff from the car was that of an agent and representative of the carrier,

the obligation imposed upon the carrier cannot be avoided by the division of labor and duties between the different agents of the carrier. There is unity of obligation, and the act of each conductor is the act of the corporation, from whom the duty is owing to the passenger. When there is a breach of that duty on the part of one agent, which results in a wrong to a passenger by another agent, of the company, the company is liable for the results, although the latter agent may have been acting in good faith, under instructions received from his employer. The fear expressed in many of the decisions that such a rule will subject the carrier to imposition has very little foundation. There can be no recovery of damages in any case unless the passenger is able to prove that he was entitled to a good transfer and was deprived of it by the negligent act of the first conductor. The rule which we adopt has been in force in many states for years, and we are yet to learn that any serious prejudice has resulted therefrom to carriers of passengers. * * *

The order of the trial court is affirmed.

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b. To Make Limitations by Contract.

RAILROAD COMPANY v. LOCKWOOD, 17 Wall. (U. S.) 357.

(1873)

Error to the Circuit Court for the Southern District of New York; the case being thus:

Lockwood, a driver, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them, and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than

tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

It may be assumed in limine, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsi-

bility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels. Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by State legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been affected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employes, and liable without limit for his own negligence.

It is true that the first section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of Congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-

law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This, they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law.

But since the decision in the case of The New Jersey Steam Navigation Company v. Merchants' Bank, by this court, in January Term, 1848, it has been uniformly held, as well in the courts of New York as in the Federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of The New Jersey Steam Navigation Company v. Merchants' Bank, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been entrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier of his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is nevertheless, due to the courts of that State to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York, after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of Dorr v. The New Jersey Steam Navigation Company, decided in 1850. This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities,—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by ex-

press special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank, in 6th Howard, and such we consider to be the law in the present case." And in Stoddard v. Long Island Railroad Company, another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge Duer for the court, says: "Conforming our decision to that of the Supreme Court of the United States, we must, therefore, hold: 1st. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2d. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3d. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases, all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of Wells v. New York Central Railroad Company, that the Supreme Court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger traveling on a free ticket, which exempted the company from liability. In 1862 the Court of Appeals by a majority affirmed this judgment, and in answer to the suggestion that public policy required that the railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the traveling public. Perkins v. The New York Central Railroad Company, was also the case of a free passenger, with a similar ticket, and the court held that the endorsement exempted the company from all kinds of

negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of drovers' passes, in which the passenger took all responsibility of injury to himself and stock. The first was that of Smith v. New York Central Railroad Company, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The Supreme Court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the Court of Appeals in 1862 by a vote of five judges to three. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the State; yet the State has a deep interest in protecting the lives of its citizens. He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract

valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, Bissell v. The New York Central Railroad Company, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents, or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The Supreme Court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire; and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the Court of Appeals, four judges against three; Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by Wells v. The Central Railroad Company; but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusion reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of everyone to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon

the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of Poucher v. New York Central Railroad Company, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other State courts which, by dicta or decision either favor or follow, more or less closely, the decisions in New York. A reference to the principal of them is all that is necessary here.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."

We now proceed to notice some cases decided in other States, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his

liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. "The doctrine is firmly settled," says Chief Justice Thompson, in Farnham v. Camden and Amboy Railroad Company, "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." This inability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In Pennsylvania Railroad Company v. Henderson, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decision, says: "This endorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants. In Davidson v. Graham, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interest. * * * And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In Welsh v. Pittsburg, Fort Wayne, and Chicago Railroad, the court says: "In this State, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the State." From these facts, the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation which can only act through

its agents and servants, would secure complete immunity for the neglect of every duty." And in relation to a drover's pass, substantially the same as that in the present case, the same court, in Cleveland Railroad v. Curran, held: 1st. That the holder was not a gratuitous passenger; 2dly. That the contract constituted no defense against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of Bissell v. The New York Central Railroad, and of Pennsylvania Railroad v. Henderson, and expresses its concurrence in the Pennsylvania decision. This was in December Term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is upon him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, &c., yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove

the principal safeguard for the preservation of life and property in such conveyances."

To the same purport it was held in Massachusetts in the late case of School District v. Boston, &c., Railroad Company, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence."

To the same purport, likewise, are many other decisions of the State courts, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here.

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in The Doctor and Student, pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney-General Noy in his book of Maxims as unquestioned law. And so the law undoubtedly stood in England until comparatively a very recent period. Serjeant Steven, in his Commentaries, after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice." But the term "gross negligence" was so vague and uncertain that

it came to represent every instance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking. Justice Story, in his work on bailments, originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of Peck v. The North Staffordshire Railway Company, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Justice Story's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of Carr v. Lancashire Railroad Company, and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the Railway and Canal Traffic Act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condi-

tion, unless the court or judge trying the cause should adjudge the conditions just and reasonable. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of The New Jersey Steam Navigation Company v. Merchants' Bank. On the precise point now under consideration, Justice Nelson said, "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to carriers of passengers, Mr. Justice Grier, in the case of Philadelphia and Reading Railroad v. Derby, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that, as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of The Steamboat New World v. King, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law.

In York Company v. Central Railroad, the court, after conceding that the responsibility imposed on the carrier of goods

by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of Walter v. The Transportation Company, decided at the same term, it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our Great Lakes as well as to the sea. And in Express Company v. Kountze Brothers, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of State courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee: and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin.

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation

contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr v. The New Jersey Steam Navigation Company, the court sums up its decision in these words: "The right of public carriers to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a carload; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary

it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such article or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle,

although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the Railway and Canal Traffic Act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract, and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which

the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called

ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers, for hire, and with special force to the latter.

Fourtly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

JACOBUS v. ST. PAUL & C. RY. CO., 20 Minn. 125.

(1873)

Appeal by defendant from an order of the court of common pleas, Ramsey county, denying a new trial.

BERRY, J. The plaintiff brings this action to recover damages for injuries occasioned to his person by the alleged gross negligence of defendant's servants in charge of defendant's railway train, upon which plaintiff was traveling. Plaintiff was riding upon a free pass, which together with the conditions indorsed, is in these words, viz.:

"St. Paul & Chicago Railway.

"Pass D. Jacobus upon the conditions indorsed hereon, until Dec. 31, 1871, unless otherwise ordered. Not transferable.

D. C. Shepard,

"Chf. Eng. and Supt."

"Conditions.

"The person who accepts and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it."

Upon the pleadings and the charge of the court, the first question arising in this case is, whether the pass, with its conditions, protects defendant from liability for injury received by plaintiff

while riding upon such pass, even though the injury was caused by gross negligence upon defendant's part. In our own opinion, this question should be answered in the negative, for the reason that the degree of care and diligence exacted of a bailee should be proportioned to the importance of the business and of the interests at stake. Holly v. Boston Gas-Light Co., 8 Gray, 131; Goddard v. G. T. R. Co., 57 Me. 202. "The law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers, and holds him liable for the slightest neglect." McClean v. Burbank, 11 Minn. 288, (Gil. 189.) And for like reasons the same extreme care is required, though the passenger be carried gratuitously. Having undertaken to carry, the duty arises to carry safely. Phil. & R. R. Co. v. Derby, 14 How. 486; Nolton v. Western Ry., 15 N. Y. 444; Steamboat New World v. King, 16 How. 474; 2 Redf. Railw. 184-5, and notes; Perkins v. N. Y. Cent. R. Co., 24 N. Y. 196; Todd v. Old Col. & F. R. Co. 3 Allen, 21.

In the case at bar, however, the plaintiff was not merely a gratuitous passenger, i. e., a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? Upon the question whether conditions of this kind are valid and effectual to exonerate the carrier of passengers, the adjudications differ. In New York the conditions appear to be held sufficient to absolve the carrier from liability, even for the gross negligence of his employes. Wells v. N. Y. Cent. Ry. 24 N. Y. 181; Perkins v. Same, Id. 196; Bissell v. Same, 25 N. Y. 442. In New Jersey it is held that such conditions are good as against ordinary negligence, with a very decided intimation that the exemption from liability comprehends gross negligence also. Kenney v. Cent. R. Co. 34 N. J. 513.

In Pennsylvania, Illinois, Indiana, and several other states the courts hold that no such conditions will avail to protect the carrier from responsibility for the gross negligence of its employes. Ill. Cent. Co. v. Read, 37. Ill. 484; 19 Ill. 136; Ind. Cent. R. Co. v. Munday, 21 Ind. 48; Pa. R. Co. v. McClosky's

Adm'r, 23 Pa. St. 532; Mobile & Ohio Ry. Co. v. Hopkins, 41 Ala. 489.

There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government as parens patriae has in protecting the lives and limbs of its subjects. Shear. & R. Neg. § 24; C. P. & A. R. Co. v. Curran, 19 Ohio St. 12; Phil. & Reading R. Co. v. Derby, supra; Steam-boat New World v. King, supra; Smith v. N. Y. Cent. R. Co. 24 N. Y. 222; Ill. C. R. Co. v. Read, supra; Pa. R. Co. v. Henderson, 51 Pa. 315; Bissell v. N. Y. C. R. Co. 25 N. Y. 455, per Denio, J.; N. Y. Cent. R. Co. v. Lockwood, (U. S. Sup. Ct.) not yet reported.

So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can then be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned.

It is said, however, that it is unreasonable "to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible." In the first place, if this consideration were allowed to prevail, it would prove too much; for it could be urged with equal force

and propriety in the case of a merely gratuitous passenger as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire.

Again, suppose (what is not at all impossible or improbable, as, for instance, in case of a free excursion) that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility the greater the care; and that any relaxation of responsibility is dangerous.

Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule imposing stringent obligations upon him. It is the enforcement of the rule, and of the liability imposed thereby —the mulcting of the carrier for his negligence—which brings home to him in the most practical, forcible, and effectual way, the necessity for strictly fulfilling his obligations.

It may be that on a given occasion the gratuitous passenger, or the passenger upon a free pass, is the only person injured, (as, for aught that appears, was the fact in this instance,) or the only party who will proceed against the carrier, the only person who will practically enforce upon the carrier the importance of a faithful discharge of his duty. These considerations, as it seems to us, ought to be decisive upon the point that sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed though the passenger be gratuitous, or, as in this case, riding upon a conditioned free pass. It is contended that there was no proof of gross negligence on defendant's part, and that, therefore, the verdict was not justified. There was evidence that the train was a mixed train; that it was running from 40 to 45 miles an hour, according to the plaintiff, and according to the other witnesses from 15 to 22 miles an hour; that the lumber was upon a plat-

form car, and that the stake of the lumber car, in consequence of the breaking of which the injury occurred, was a stick of butternut cord wood, and was cross-grained. There was also the testimony of J. T. Maxfield, of St. Paul, a passenger who appears to be an intelligent and entirely disinterested witness, and who says: "I felt anxious about the lumber car. I was afraid of the speed. * * * I was apprehensive of danger from the character of our train. I spoke to the brakeman about it. * * * Have traveled on trains a good deal." And taking all these facts together,—to say nothing about others appearing in the case,—it cannot be said that there was not evidence in the case proper to be considered by the jury, and having some reasonable tendency to establish negligence, which has been well described as being a negative word signifying the absence of such care as it is the duty of the negligent party to exercise in the particular case. Grill v. General, etc., Collier Co. L. R. 1 C. P. 612; Steam-boat New World v. King, supra. We will go further, even, and say that the evidence, in our opinion, had a reasonable tendency to establish gross negligence in the sense of a great degree of negligence. Ang. Carr. § 22. As to the point of the degree of negligence necessary to sustain this action it is, however, to be remarked, in view of the stringent rule as to liability, that where the question is between a railway carrier of passengers and a passenger, there would seem to be no occasion for the ordinary distinction of different degrees of negligence, as slight, ordinary, and gross. As is well and forcibly said by Mr. Justice Grier in Phila. & Reading R. Co., supra: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" So in Steamboat New World v. King, Mr Justice Curtis, referring to the doctrine thus announced, says: "We desire to be understood to reaffirm that doctrine as resting not only on public policy, but on sound principles of law." A similar view of the impracticability of a distinction between different kinds of negligence as applicable to cases of this kind is taken in Perkins v. N. Y. Cent.

R. Co. supra. The carrier being bound to exercise the greatest care, and being liable for the slightest neglect, what is said by Rolfe, B., in Wilson v. Brett, 11 Mees. & W. 113, and indorsed by Willis, J., in Grill v. General, etc., Collier Co. L. R. 1 C. P. 612, is in point in a case of this kind, viz., that he "could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet." See also, Ang. Carr. § 23, and Briggs v. Taylor, 28 Vt. 180.

It is further argued on behalf of the defendant, that the plaintiff, by his own negligence, contributed to the injury sustained, and for that reason, he cannot recover. This argument is founded upon the fact that plaintiff was in the baggage car at the time of the accident, and, as defendant contends, wrongfully there. But, in the first place, the evidence is conflicting as to whether or not the plaintiff was informed of the rule of the company excluding passengers from the baggage car. If he was not so informed, and was suffered to remain there without objection, it could hardly be said that his presence there was negligence. Dunn v. G. T. Ry. 58 Me. 187. Again, if it be admitted that the plaintiff was duly informed of the regulation of the company excluding passengers from the baggage car, the evidence shows that he was, at least, permitted to remain there by the conductor. If he was thus permitted to remain, so that he was there with the knowledge of the conductor, and without any attempt on the part of the conductor to enforce the company's rule by removing him, his presence there would not be such negligence as would exonerate the defendant from the consequences of its negligence or want of care. On the contrary, his presence there, under such circumstances, would render it the duty of the company, in view of the fact that he was there, to exercise the highest care required for his safety, and to refrain from the slightest neglect tending to his injury. Dunn v. G. T. Ry. supra; Isbell v. N. Y. & N. H. Ry. Co. 27 Conn. 393; 2 Redf. Railw. Cas. 474-502.

Still, again, admitting that the plaintiff was cognizant of the rule of the company excluding passengers from the baggage car, and that he persisted in remaining there without the permission or consent, yet with the knowledge, of the conductor, and was guilty of negligence in so doing, this negligence would not prevent his recovering unless it were contributory to the

injury received. To be thus contributory, in a legal sense, it must be a proximate cause of the injury,—that is, it must have been near in the order of causation, (Shear & R. Neg. 37, 38,) and it must have contributed to some extent, directly to the injury, and must have been not a mere technical or formal wrong contributing either incidentally or remotely, or not at all, to the injury. Isbell v. N. Y. & N. H. R. Co. supra; 2 Redf. Railw. Cas. 485-490.

Now, notwithstanding the fault or negligence of the plaintiff in remaining in the baggage car, and admitting that the baggage car was a place of greater danger than the passenger car, and that the plaintiff would not have been injured if he had not been there, his presence there, with the knowledge of the conductor, made it defendant's duty to exercise care to avoid injuring him while there; and if injury resulted from want of such care, the defendant is liable. Isbell v. N. Y. & N. H. R. Co. supra. If the injury resulted from want of such care,—i. e., negligence on defendant's part,—such negligence, and not plaintiff's fault in being in the baggage car, would be the immediate and direct—the more proximate—cause of the injury, and defendant would be responsible for the same. Isbell v. N. Y. & N. H. R. Co. supra; C. C. & C. R. Co. v. Elliott, 4 Ohio St. 476; Shear. & R. Neg. § 25; Keith v. Pinkham, 43 Me. 503; Huelsenkamp v. Citizens' Ry. Co. 37 Mo. 537; Richmond v. Sac. R. Co. 18 Cal. 351; Lackawanna & B. R. Co. v. Chenewith, 52 Pa. 386.

In our opinion there was evidence in the case for the consideration of the jury in reference to these views of the law, and from which they might reasonably find that plaintiff's negligence in this case was not contributory to the injury received by him.

These considerations dispose of the case, the result being that the order denying a new trial is affirmed.[1]

AUERBACH v. NEW YORK CENT. & H. R. R. CO., 89 N. Y. 281.

(1882)

EARL, J. This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars

[1] 6 Cyc. 580.

while he was riding therein as a passenger. He was nonsuited at the trial, and the judgment entered upon the nonsuit was affirmed at the General Term. The material facts of the case are as follows:

The plaintiff, being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis over the several railroads mentioned in coupons annexed to the ticket to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named on coupon attached"; that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that, if he failed to comply with such agreement, either of the companies might refuse to accept the ticket, or any coupons thereof, and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket, and rode to Cincinnati, and there stopped a day. He then rode to Cleveland and stayed there a few hours, and then rode on to Buffalo, reaching there on the 24th, and stopped there a day.

Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows: "Issued by Ohio and Mississippi Railway on account of New York Central and Hudson River Railroad one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached, to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched several times, until the plaintiff reached Hudson about 3 or 4 o'clock a. m., September 27th, when the conductor in charge of the train declined

to recognize the ticket on the ground that the time had run out, and demanded $3 fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit upon the ground that, although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket.

We are of opinion that the plaintiff was improperly nonsuited. The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company through the agent selling the ticket made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. Hutchinson on Carriers, § 579; Brooke v. Grand Trunk Railway Co., 15 Mich 332.

But the plaintiff was bound to a continuous passage over the defendant's road; that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train, and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and then make it continuous. The language of the contract and the purpose which may be supposed to have influenced the making of it do not require a construction which would make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The

purpose was only to secure a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September, and presented his ticket, and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned, it had then performed its office. It was thereafter left with him not for his convenience, but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in such doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

SLEEPER v. PENNSYLVANIA R. CO., 100 Pa. 259.

(1882)

Case, by George W. Sleeper against the Pennsylvania Railroad Company, to recover damages for an illegal ejecting of plaintiff from defendant's train.

On the trial the plaintiff testified that on the morning of May 8, 1878, he took passage on the defendant's train from New York to Philadelphia and tendered to the conductor in payment of his fare a ticket which he had bought several months before at a place on Broadway, New York, not a regular agency of the company, but a place where they advertised tickets at reduced rates. He further testified that he paid for the ticket one dollar less than the current rates. The conductor refused to receive the ticket, and upon plaintiff's refusing to pay the fare put him off the train at Elizabeth. The present suit was then brought. The court on motion of defendant awarded a nonsuit, which the court in banc subsequently declined to take off. Plaintiff thereupon took this writ, assigning for error the granting of the nonsuit and the refusal to take off the same.

Mr Justice Trunkey. The parties agree that this case presents a single question, whether a person purchasing a ticket over the Pennsylvania Railroad from New York to Philadelphia, from a ticket dealer who is not an authorized agent of the company, can maintain an action in the courts of this state for the refusal of the company to carry him between these points in return for said ticket.

By the act of May 6, 1863 (P. L. 582), it is made the duty of every railroad company to provide each agent authorized to sell tickets entitling the holder to travel upon its road, with a certificate attested by the corporate seal and the signature of the officer whose name is signed to the tickets. And any person not possessed of such authority, who shall sell, barter, or transfer, for any consideration, the whole or any part of a ticket, or other evidence of the holder's title to travel on any railroad, shall be deemed guilty of a misdemeanor, and shall be liable to be punished by fine and imprisonment. The purchasing and using a ticket from a person who has no authority to sell, is not made an offense.

That the plaintiff's ticket, on its face, entitled him to the rights of a passenger between the points named, is unquestioned. The only reason for denying him such right was that he bought from one who sold in violation of the statute in Pennsylvania. It is not said that the vendor in New York is actually guilty of the

statutory offense, but that the defendant, being a corporation in Pennsylvania, and the stipulated right of passage being partly in Pennsylvania, her courts will not enforce a contract resting upon acts which the Legislature has declared criminal.

The presumption is that the ticket was properly issued by the company, and that the holder had the right to use it. Such tickets are evidence of the holder's title to travel on the railroad. Prior to the statute in Pennsylvania, it was lawful for holders to sell them.

The property in them passes by delivery. The act of 1863 confers no right upon a railroad company to question passengers as to when, or where, or how they procured their tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company. At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed. No part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was the mere purchase of the obligation of a common carrier, to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the bona fide holder to performance, and for breach to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania, it is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, "this action is to enforce not the contract between the ticket scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error."

The sale of the ticket to the plaintiff in New York was lawful. That being an executed contract, there is no question respecting its enforcement. Surely it is not an exception to the rule that contracts, valid by the law of the place where they are made, are generally valid everywhere. Then, as the plaintiff has a valid

title to the ticket, the contract between the defendant and himself is valid.

Judgment reversed and procedendo awarded.[1]

QUIMBY v. BOSTON & M. R. CO., 150 Mass. 365, 23 N. E. 205.

(1890)

An action of tort by Asabel Quimby against the Boston & Maine Railroad, for personal injuries sustained in a collision upon its railroad.

DEVENS, J. When the plaintiff received his injury he was traveling upon a free pass given him at his own solicitation, and as a pure gratuity, upon which was expressed his agreement that, in consideration thereof, he assumed all risk of accident which might happen to him while traveling on or getting off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "provided he signs the agreement on the back hereof." In fact the agreement was not signed by the plaintiff, he not having been required to do so by the conductor who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed, and was not required to sign, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire v. Railroad Co., 98 Mass. 239; Hill v. Railway Co., 144 Mass. 284, 10 N. E. Rep. 836; Railroad Co. v. Chipman, 146 Mass. 107, 14 N. E. Rep. 940. The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein, because he did not and was not required to sign it. Railway Co. v. McGown, 65 Tex. 643; Railroad Co. v. Read, 37 Ill. 484; Wells v. Railway Co., 24 N. Y. 181; Perkins v. Railway Co., Id. 196. If this is held to be so, the case presents the

[1] Sale by ticket brokers (scalpers) of non-transferable tickets enjoined, Bitterman v. Louisville etc., R. Co., 207 U. S. 205.

single inquiry whether such a contract is invalid, which has not heretofore been settled in this state, and upon which there has been great contrariety of opinion in different courts. If the common carrier accepts a person as a passenger, no such contract having been made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. Files v. Railroad Co., 149 Mass. 204, 21 N. E. Rep. 311; Todd v. Railroad Co., 3 Allen 18; Com. v. Railroad Co., 108 Mass. 7; Littlejohn v. Railroad Co., 148 Mass. 478, 20 N. E. Rep. 103; Railroad Co. v. Derby, 14 How. 468; The New World v. King, 16 How. 469. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases the English decisions, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a "free pass," issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would without doubt be applied where a servant, from the peculiar character of goods, as delicate machinery, was permitted to accompany them, and in other cases of that nature. That passes of this character are "free passes," properly so called, has been denied in other cases, as the carriage of the drover is a part of the contract for the carriage of the animals. The cases on this point were carefully examined and criticized by Mr. Justice Bradley in Railroad Co. v. Lockwood, 17 Wall. 367, and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it con-

sidered the plaintiff a free passenger instead of one for hire. Railway Co. v. Stevens, 95 U. S. 655, in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one traveling upon a "drover's pass," as it is sometimes called, is a free passenger, they show that, in the opinion of these courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case at bar there is no question of any willful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the cost of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are Griswold v. Railway Co., 53 Conn. 371, (1885,) and that of Railway Co. v. McGown, ubi supra, (1886,) in which the precise question before us was raised, and decided, after a careful examination of the authorities, in a different manner by the highest court of Connecticut and that of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passage was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier are dependent upon the contract; that while, with reference to matters indifferent to the public, parties may contract according to their own

pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers with safety; that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servants, in order that this safety may be secured to all who travel. It is also said that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgle or seek redress in courts; that he must take the alternatives the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risk of transportation, for being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in a few words, public policy forbids that contracts should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of a "common carrier," which is that of a person or corporation pursuing the public employment of carrying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to

the solicitation of the passenger, he consents, for the time being, to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, also to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that besides the gift of free transportation the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence, (or that of the corporation itself, where that is the carrier,) he can contract for the exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, and the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. The New World v. King, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or furnish proper appliances for the conduct of its business. We are of opinion that where one accepts, purely as a gratuity, a free passage upon a railroad train, upon the agreement that he will assume all risk of accident which may happen to him while traveling on such train, by which he may be injured in his person, no rule of pub-

lic policy requires us to declare such contract invalid and without binding force. By the terms of the report there must therefore be judgment for defendant.

BALTIMORE & OHIO R. CO. v. VOIGT, 176 U. S. 498, 20 Sup. Ct. 385.

(1899)

On a certificate from the United States Circuit Court of Appeals for the Sixth Circuit asking if an express messenger is a passenger within a rule which prevents exemption of liability for negligence. Answered in the negative.

Statement by Mr. JUSTICE SHIRAS: * * *

Mr. JUSTICE SHIRAS delivered the opinion of the court:

The question we are asked to answer is whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by invoking that principle of public policy which has been held to forbid common carriers of passengers for hire to contract against responsibility for negligence.

The circuit judge thought the case could not be distinguished from the case of New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, where a recovery was maintained by a drover injured while traveling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but whinch provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover traveling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such a passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. Grand Trunk R. Co. v. Stevens, 95 U. S.

655, 24 L. ed. 535; Liverpool & G. W. Steam Co. v. Phenix Ins.. Co. 129 U. S. 379, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in Printing & N. Registering Co. v. Sampson, L. R. 19 Eq. 465:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of New York C. R. Co. v. Lockwood:

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly, for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the

highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the Lockwood Case as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle, or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse

(to say the least) to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability from losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

We have here to consider not the case of an individual shipper or passenger dealing, at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the Express Cases, 117 U. S. * * *

The cases were suits brought by certain express companies which had been doing business on certain railroads under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a right what they had theretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with an entire copy of the contract between the plaintiff in error, the Baltimore & Ohio

Southwestern Railway Company, and the United States Express Company, but it is sufficiently disclosed in the statement made by the judges of the circuit court of appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employes of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employes of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car specially adapted to the use of the express company was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal-contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, to each other for injuries he might receive

in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no legal compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employe than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business,—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employe of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doctrine of public policy than was justified by the facts and reasoning in the Lockwood case.

This subject has received attentive consideration in several of the state courts.

In Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633, it was held that if an express messenger holding a season ticket

from a railroad company, and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by negligence of the company's servants. In its opinion the court said:

"The question of a right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under this contract as construed in this case. See New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Griswold v. New York & N. E. R. Co. 53 Conn. 371, 4 Atl. 261. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. * * * The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggagemaster in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggagemaster, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from

the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of Hosmer v. Old Colony R. Co. 156 Mass. 506, 31 N. E. 652.

Robertson v. Old Colony R. Co., 156 Mass. 526, 31 N. E. 650, was an action brought for personal injuries caused to the plaintiff, an employe of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring; and it was held that, as the defendant company was under no common-law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

Griswold v. New York & N. E. R. Co. 53 Conn. 371, 4 Atl. 261, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains, and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

The Supreme Court of Michigan, in Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 22 N. W. 215, where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo to Detroit on cars belonging to the plaintiff, stopping at certain named points for exhibition, the plaintiff paying a fixed price therefor, held that such transportation was not a transaction with a common carrier as such, that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by

the circuit court of appeals of the seventh circuit, citing Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 22 N. W. 215, and Robertson v. Old Colony R. Co. 156 Mass. 506, 31 N. E. 650, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from New York C. R. Co. v. Lockwood: "A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." Chicago, M. & St. P. R. Co. v. Wallace, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161.

Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 38 L. R. A. 93, 44 N. E. 796, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger, and the railroad company were in terms similar to those existing in the present case, and the defense was the same as that made here. It was held that the contracts were valid and that the defense was good. It was said:

"Under the doctrine declared in the Express Cases, 117 U. S. 1, sub nom. Memphis & L. R. R. Co. v. Southern Exp. Co. 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon in the space set apart in the baggage car for that

purpose. Under the authorities cited it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the Supreme Court of Indiana, in Pittsburgh, C. C. & St. L. R. Co. v. Mahoney, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 N. E. 464, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employe of an express company of all liability for injuries sustained by the negligence of the employer or otherwise includes the liability of the express company to hold a railroad company with which it does business harmless against claims by employees of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employe of such express company.

A precisely similar question was presented in the case of Blank v. Illinois C. R. Co. and was decided the same way by the court of appeals for the first district of Illinois, in an opinion rendered March 14, 1899. 80 Ill. Ap. 475. The court cites the Express Cases, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the Supreme Court of Illinois. 182 Ill. 332, 55 N. E. 332.

The same doctrine prevails in the state of New York: Bissell v. New York C. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Poucher v. New York C. R. Co., 49 N. Y. 263, 10 Am. Rep. 364. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of New York C. R. Co. v. Lockwood to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of everyone to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that

postal clerks, in the employ of the government, and who pay no fare, are entitled to the rights of ordinary passengers for hire; and it is contended that their relation to the railroad company is analogous to that of express messengers. Arrowsmith v. Nashville & D. R. Co., 57 Fed. Rep. 165; Gleeson v. Virginia Midland R. Co., 14 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; Cleveland, C. C. & St. L. R. Co. v. Ketcham, 133 Ind. 346, 19 L. R. A. 339, 33 N. E. 116; Seybolt v. New York, L. E. & W. R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger had agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous it should be made to appear that the government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

Brewer v. New York, L. E. & W. R. Co., 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324, is also cited as a case wherein a recovery was maintained by an express messenger against a railroad company, and where there existed an agreement between the express company and the railroad company that the latter should be indemnified against and protected from all the risks and liabilities. But the court put its judgment against the railroad company expressly upon the ground that the messenger had no knowledge or information of the contract between the companies, and was not himself a party to the agreement to exempt the railroad company.

Kenney v. New York C. & H. R. R. Co., 125 N. Y. 422, 26 N. E. 626, was also a case where, in an action for damages by an express messenger against a railroad company, the plaintiff was permitted to recover, notwithstanding there was an agreement between the companies that the railroad company should be released and indemnified for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. But it did not appear that there had been any assent

to a knowledge of this contract on the part of the messenger; and the court said:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employes. The rule is firmly established in this case that a common carrier may contract for immunity from its negligence or that of its agents; but that to accomplish that object the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except when the carrier's immunity from the consequences of negligence is read in the agreement ipsissimis verbis."

Chamberlain v. Pierson, 59 U. S. App. 59, 87 Fed. Rep. 421, 31 C. C. A. 158, in the circuit court of appeals of the fourth circuit, was a case in which an express messenger was injured while traveling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the acton. The court said:

"The discussion of this feature of the case presents the question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, * * * answered, 'If I had known that I wouldn't have gone.'"

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of New York C. R. Co. v. Lockwood; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

Accordingly, we answer the question submitted to us by the judges of the Circuit Court of Appeals in the negative; and it is so ordered.[1]

MR. JUSTICE HARLAN, dissenting:

In New York C. R. Co. v. Lockwood, 17 Wall. 357, 384, 21 L. Ed. 627, 641, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that "a drover traveling on a pass, such as was given in this case, * * * is a passenger for hire." The railroad pass referred to declared that its acceptance was to be considered a waiver of all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines of New York C. R. Co. v. Lockwood, and that the judgment should be affirmed upon the broad ground that the defendant corporation could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of its business, whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

MORNINGSTAR v. LOUISVILLE & N. R. CO., 135 Ala. 251. (1902)

SHARPE, J. Apart from the office it may perform in evidencing the contract of carriage, the chief use of a passenger ticket is to identify the holder as a person who has paid his fare, or has otherwise complied with conditions entitling him to carriage, and this use of it ordinarily made when the holder offers himself to be carried; hence, where nothing is expressed to the con-

[1] Employees of sleeping car.—6 Cyc. 579; Chicago, etc., R. Co. v. Hamler, 215 Ill. 525.

trary, a stipulation purporting to limit the use of a ticket to a specified time is construed as fixing that time as the latest for commencing, and not for completing, the journey. Auerbach v. Railroad Co., 89 N. .Y 281, 42 Am. Rep. 290; Lundy v. Railroad Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100.

Accordingly the clause in plaintiff's ticket declaring it "void after May 20, 1900," implied a stipulation merely for plaintiff's commencement of the trip from Pensacola before the expiration of that day. He had a right to assume, and to rely upon the assumption, that defendant would conform to its schedule for running trains, and was prevented from entering upon his journey on May 20th only by delay until after midnight of the train scheduled to leave Pensacola at the hour of 11:20 p. m. of that day. Defendant was not entitled to treat its own default as defeating its obligation to the plaintiff, nor was that obligation discharged by placing him at Flomaton.

Defendant operated the road from Flomaton to Mobile, as well as that from Pensacola to Flomaton, and, having accepted his ticket for passage to the latter place, and having delayed his arrival there until the usually connecting train had gone, it was under the duty to not abandon him, and to afford him opportunity to proceed by another train to Mobile. If, as the evidence tends to show, the plaintiff was duly diligent about attempting to pursue his journey from Flomaton, the conductor of the Mobile train in ejecting him acted not under, but in violation of, the contract of carriage. The ticket did not purport to show on its face, or in connection with the fact that plaintiff was journeying late, that any forfeiture had occurred under the time limitation, for the circumstances controlling his right to so travel were not disclosed by the ticket. The conductor, in denying that right, simply risked the company's responsibility upon the existence vel non of facts avoiding such forfeiture. The evidence offered by plaintiff tended to the establishment of such facts, and should not, as a whole, have been excluded from the jury.

Reversed and remanded.[1]

[1] Ticket good after time limited if failure to use is due to a wreck.—Gulf, etc., Co. v. Looney, 85 Tex. 158, or because last day for using ticket falls on Sunday and no trains run on that day,—Little Rock, etc., Co. v. Dean, 45 Ark. 529; and as to effect of strike, see, Elliott v. Southern Pac. Co., 145 Cal. 441.

NORTHERN PAC. RY. CO. v. ADAMS, 192 U. S. 440.

(1904)

Action under a statute of Idaho which gave to heirs of persons killed by the wrongful act or neglect of another a right to recover damages. The deceased was killed by falling from a train in motion while passing from one car to another. Plaintiffs had a verdict and judgment. Certiorari.

BREWER, J. * * * The company is not under two different measures of obligation—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should "not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person." He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. * * *

The rate of speed was no greater than is common on other trains everywhere in the land, and the train, was, in fact, run safely on this occasion. We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibuled platform and the high rate of speed in coming around the curve, in finding the company guilty of negligence; but clearly it was not acting either willfully or wantonly in running its trains at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence. Is the company responsible for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he take all the risks of such negligence?

This question has received the consideration of many courts, and been answered in different and opposing ways. We shall not attempt to review the cases in state courts. * * *

In Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, Voigt, an express messenger riding in a car set apart for the use of an express company, was injured by the negligence of the railway company. There was an agreement between the two companies that the former would hold the

railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employes. Voigt, entering into the employ of the express company, signed a contract in writing, whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employes.

Mr. Justice Shiras, who delivered the opinion of the court, reviewed many state decisions, and concluded with these words (176 U. S. 520, 20 Sup. Ct. 393, 44 L. Ed. 570): "Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of Railroad Co. v. Lockwood [ante, p. 445]; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered; and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error, in the proceedings of the Circuit Court and Court of Appeals. The judgments of those courts will be reversed and the case remanded to the Circuit Court, with instructions to set aside the verdict and grant a new trial.

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c. Reasonable Compensation.

MILWAUKEE ELECTRIC R. AND L. CO. v. CITY OF MILWAUKEE, 87 Fed. 577.

(1898)

Final hearing in two actions,—one wherein the street railway company is complainant, and the other brought by the trustee for the bondholders,—each seeking a decree declaring null and void, in respect of the complainant, a purported ordinance of the defendant city entitled "An ordinance to regulate the rate of fare upon the street railways in the city of Milwaukee, and providing for the sale of packages of tickets thereon," approved June 11, 1896, and to perpetually enjoin its enforcement.

SEAMAN, District Judge. * * * The twofold inquiries of reasonableness above indicated are of mixed law and fact, and start with the presumption, in favor of the ordinance, (1) that the prevailing rates exacted too much from the public, and (2) that those prescribed are reasonable.

1. Are the terms and rates fixed by the company excessive demands upon the public, in view of the service rendered? The Milwaukee Street Railway Company, of which the complainant is the successor in interest, was organized in December, 1890, for the purpose of establishing an electric street railway system, which should cover the entire field for the city of Milwaukee. There were then in operation five distinct lines, owned separately, operated mainly by horse or mule power, each charging separate fares, and having no system of transfers. It is conceded that the service was slow and antiquated, was not well arranged for the wants of the city, and was generaly inadequate and unsatisfactory. As the old lines occupied the principal thoroughfares, and the public interest prevented the allowance of double lines in such streets, the improvement could not be made effective unless those lines were purchased, or in some manner brought into the pro-

posed system. They were gradually acquired, at prices which may appear excessive when measured by results, and during the ensuing period of about three years the work of installing the new system was carried on, involving an entire reconstruction and rearrangement of the old lines and extensions, and new and improved equipments throughout, at an expenditure of over $3,000,000, aside from the cost of the old lines. As a result, at the time the ordinance was adopted, the mileage of tracks had increased from the previous aggregate of 110 miles to 142.89 miles, reaching every section of the city, with shorter and better routes, and furnishing 38 transfer points, with a universal transfer system, —a feature of special value to the public, as a single fare of five cents gives a maximum length of ride more than double the old arrangement. The service was improved in speed and regularity 10 per cent or more, with better cars and less inconvenience, and it appears beyond question that it was generally more satisactory and economical from the standpoint of the public. In other words, the service was materially enhanced in its value to the public, without any increase in either normal or maximum charges, affording rides for five cents which had previously cost two and even three fares; and against all these advantages there appears only a single benefit extended by three out of the five constituent companies which is not given under the new arrangement, namely, in the sale of commutation tickets,—an omission for which there seems to be plausible excuse and offset in the universal system of transfers, aside from the other advantages. Surely, therefore, no imposition upon the public appears through any comparison between the old and the new service and rates. Nor does it find any countenance in comparison with either service or rates which prevail in other cities, for it is shown in this record, and is undisputed, that the five-cent rate is almost universal; that commutations are exceptional in cities of like class, and arise out of exceptional conditions, which are not fairly applicable here; and that instances of lower rates are so clearly exceptional that they cannot have force for any affirmative showing of reasonableness in the instant case. Nevertheless, with the burden of proof on the defendant, these considerations are not controlling, unless it further appears that the earnings of the company are insufficient, in view of the amount which may justly be regarded as the investment in the undertaking, to warrant the

making of rates and terms which are more advantageous to the public. The interests of the public in its highways are paramount, and, if the service can reasonably be afforded more cheaply in Milwaukee than in other cities of like class, the community is entitled to the just benefit of any possible conditions which may tend to that result. The issue in that regard must be met under the second branch of inquiry, but I am clearly satisfied that this first question must be answered in favor of the complainant, if the evidence sustains its claim that lower rates would be confiscatory, and not compensatory.

2. Are the earnings of the property insufficient, in view of all the conditions, to justify this reduction in the rates of fare? Solution of this inquiry depends upon the showing (1) of earning capacity at existing rates, and (2) of the "amount really and necessarily invested in the enterprise," and upon the conclusion (3) whether the ratio of return upon the investment is excessive. In the statements which are referred to both parties have adopted a ratio, so far as necessary to separate the electric lighting plant owned by the complainant, so that the statements which follow relate exclusively to the street railway plant, except where otherwise mentioned.

First. The question of earning capacity is confined by the testimony to the results of three years' operation, being after the system was fairly installed, and inclusive of the year in which the ordinance was adopted, namely, 1894, 1895, and 1896. It is suggested on behalf of the defendant that those years were exceptional, for one cause and another, and are not a fair criterion for future earnings under more favorable circumstances; but the suggestion is without force in this case, because the ordinance operates upon these very conditions, and must, of course, be predicated upon them,—upon existing facts, and not upon mere future possibilities,—and, so determined, the instant case cannot affect rights under new conditions.

The proofs on the part of the complainant furnish, in detail, from the books of account, the gross earnings, the various items of expense and of charges for which deduction is claimed, excluding any payments of, or allowance for, interest on the bonded indebtedness, and state the net earnings as follows: In 1894, $64,868.77; in 1895, $269,202.30; in 1896, $100,628.81. In this showing it appears that deduction of $247,324.88 is made in

1894 for "depreciation," being the amount apportioned in that year to meet the alleged annual loss by physical depreciation of the plant, to keep the capital intact. No such deduction is made in 1895 and 1896, because not shown in the books, although it is insisted that like credit is due in each year, for the purposes of this case.

The defendant concedes the correctness of the showing as to the gross earnings, but disputes certain large items for which deductions are made in the above statement, corrects some items, and denies that any allowance should be made for depreciation. Aside from the fact that reports and statements of financial condition made from time to time by the company omit any of the deductions here asserted, these contentions on the part of the defendant rest solely upon the books of account kept by the company, and the testimony of Mr. De Grasse, stating his conclusions as an expert accountant from examination of such books, with the following result as to net earnings: In 1894, $387,074.70; in 1895, $479,621.11; in 1896, $66,520.99. But this total for 1896 erroneously includes an allowance of $160,550 paid for interest on bonds, which should be excluded on the basis assumed, and would make the net earnings for that year, on his computation, $227,070.99. In this statement the allowance for depreciation in 1894 is excluded by Mr. De Grasse, because that item was in fact charged off upon change in the system of bookkeeping. He also excludes large amounts of undoubted expenditures upon the hypothesis that they belong to "construction account," as covering permanent improvements, and not to "expense of maintenance," as stated; rejects certain payments as accruing on accout of previous years, and certain sums apportioned and charged off to meet damage claims; and makes corrections as to taxes, for which the book entries were made in advance upon estimates by way of apportioning the expenses of the year, pending litigation and other causes. However valuable this testimony is for analysis of the bookkeeping methods and for correction of certain charges, it is clearly insufficient, without other support, to contradict the undisputed testimony, both positive and expert, on the part of complainant, which verifies substantially its contention upon the disputed subjects of deduction, namely, that the expenditures so charged were largely, if not wholly, of such

nature as to justify deduction for "maintenance;" and that depreciation is a well-recognized fact in all such plants, for which allowance must be made to save the capital from impairment, without regard to any question of its entry upon the books.

Making allowances for maintenance alone, in accordance with the analysis presented by the expert witnesses Goodspeed, Coffin, McAdoo, and Beggs, taking in each instance the estimate most favorable to the defendant, I am satisfied that the defendant's claim of net earnings must be materially reduced, and that the largest amounts which can be assumed upon its theory, excluding any allowance for depreciation (except that for 1894 the "maintenance" allowance is increased, to bring it—the general allowance—up to the minimum estimate by the experts), would approximate the following sums:

In 1894	$230.000
In 1895	340,000
In 1896	115,000
	$685,000

—making the average earnings per year, say, $228,333.

In reference to the element of depreciation, the witness Beggs gives the following explanation:

"I think experience has demonstrated that the utmost life that can be expected from the best road-bed that can be laid to-day would be, at the outside, ten to twelve years, when it would have to be almost entirely renewed. The Milwaukee Company is in that condition today, because of the different periods that their track went down, and due to the fact that it was not all down at one time, and it must now of necessity commence to lay about 12 miles of track annually, being about one-twelfth of its total mileage; and will be required, whether they wish to or not, to lay that amount annually hereafter, and will thereby be keeping their tracks fairly up to the standard. The same applies, I might say, to the equipment. In my estimate I have calculated that the Milwaukee Company must do this year, which, as a matter of fact, it is doing, what it did last year,—in other words, put on not less than 20 of the most modern, best-constructed equipments, thereby keeping its standard up to the minimum it has now, of 240 equipments; because I think it is fair to assume that the

average life of the double equipment, taken as a whole, will not exceed twelve years, the life of the motor being somewhat less than that, and that of the car we hope may exceed it possibly several years,—I mean the car bodies; but that, in the main, we hope that we will get an average life of twelve years out of them. So, taking 30 equipments annually, you would keep to your standard of 240 equipments, which is absolutely necessary to maintain—to operate—the Milwaukee Street Railway. I mean cars complete, with motors and complete electrical equipment."

For the causes thus stated, within general rules which are well known, it is manifest that this element must be taken into account before it can be determined that earnings derived from a plant are excessive; and in the same line there is much force in the argument of counsel that consideration should also be given to the factor of depreciation by amortization of franchises, as all the franchises in question terminate in the year 1924. The latter item, if allowed, would be a matter of simple computation; but a just measure of physical depreciation seems, to some extent, although only partially, involved in provisions for maintenance, and, while the testimony is very full and instructive upon this subject, it does not clear the case from serious difficulties in the way of stating a definite ratio or sum for such allowance. I am, however, clearly of opinion that neither of these elements is essential to the determination of the issues upon any aspect presented by the testimony, and that depreciation may be left to serve as an important factor of safety, in either view.

Second. As to valuation: For purposes of the company, the value of the property, including both railway and lighting plants, appears to have been placed at $14,250,000, represented by the issue of bonds for $7,250,000; preferred stock, $3,500,000; and common stock $3,500,000; but this aggregate was clearly excessive, after excluding the electric lighting department, and on no view can it be taken as the basis for the present consideration. The statements of the actual cost of the constituent street railway properties, including the cash investment for improvements, are necessarily complicated, from the fact that payments were partly made in stocks and bonds, and the aggregate amount varies according to the ratio of valuation placed upon the bonds alone,—in two statements in which the stock is excluded, and

in one statement which values both stocks and bonds,—the minimum being $9,024,107.85, and the maximum $11,313,829.84. The former amount was subsequently modified (page 465, Complainant's Proof), making the statement of cost $8,885,644.17; and as this excludes any valuation of stock, and places the value of the bonds at the discount agreed upon between the parties, which also seems fair, it may justly be taken as representing the true amount invested. But adoption of this purchase amount does not meet the issue, as it is the value of the investment, and not the amount paid, which must control. On the other hand, both parties introduce testimony placing valuations upon the various items of the plant as it exists in fact, upon the basis of its reproduction value. This amount, as stated by the witnesses for complainant, aggregates $5,153,287.76; while, on the face of defendant's proofs, the value of the tracks and equipment is placed at $2,358,799; the real estate and buildings being valued separately, and the highest valuation of the real estate being $236,949, and of the buildings $208,449, making the aggregate $2,804,197. It appears, however, that these estimates on behalf of the defendant omit 27 miles of track, many parcels of real estate, and other items, so that counsel for defendant concedes that this aggregate should be increased to $3,679,631. The wide difference in these amounts is mainly due to divergence in the estimates upon tracks and equipment. So the amounts on real estate and buildings, after allowance for the omissions, would appear higher on the valuations submitted by the defendant than those of the other side. For the valuation of tracks and equipment, the defendant relies upon the estimate made by Mr. Partenheimer, a witness of apparent ability and experience as a street railway contractor, engaged in business at Chicago; but his examination of the plant was cursory, being made within three days and could not give the detailed information upon which a just estimate for this inquiry must be based, and it is conceded that he left out of consideration many important items (aside from the error in mileage) which should enter in and would greatly increase the amount as estimated on his basis. Both upon its face and by reference to other sources of information, this estimate is far below any fair valuation, for the purpose in view, either at the sum stated

by the witness, or with the additions conceded on behalf of the defendant; the former amount being in fact $320,000 short of the actual cash expenditures by the company for construction and equipment. Opposed to this, the estimate for complainant is made by Mr. Clark, an expert of distinction in this line, who gave weeks to the examination, with the aid of a corps of assistants, and presents the results in detailed statements, so that his testimony and estimates impress me as well founded; and they are supplemented and supported by the testimony of Mr. Coffin, Mr. Payne, and other witnesses, and by comparative showing of mileage valuations in Massachusetts, which appear in the noteworthy system of reports published by that State. I am satisfied that the property of complainant represents a value, based solely upon the cost of reproduction, exceeding $5,000,000. And I am further satisfied that this amount is not the true measure of the value of the investment in the enterprise. It leaves out of consideration any allowance for necessary and reasonable investment in purchase of the old lines and equipments, which were indispensable to the contemplated improvement, but of which a large part was of such nature that it does not count in the final inventory. No allowance enters in for the large investment arising out of the then comparatively new state of the art of electric railways for a large system, having reference to electrical equipment, weight of rails, character of cars, and the like, of which striking instance appears in the fact that the electric motor which then cost about $2,500 can now be obtained for $800; so that work of this class was in the experimental stage in many respects, and the expenditures by the pioneer in the undertaking may not fairly be gauged by the present cost of reproduction. Of the $5,000,000 and over paid for the acquisition of the old lines, it would be difficult, if not impossible, from the testimony, to arrive at any fair approximation of the share or amount of tangible property which enters into the valuation in this inventory. It does appear that the roadways required reconstruction with new rails and paving, and that the amount stated was actually paid by the investors, making their investment nearly $9,000,000. How much of this may be defined or apportioned as the amount which was both "really and necessarily invested in the enterprise" (vide Road Co. v. Sandford, supra) I have

not attempted to ascertain, except to this extent: that I am clearly of opinion that at least $2,000,000 of those preliminary expenditures are entitled to equitable consideration, as so invested, beyond the reproduction value, if the valuation of the investment is not otherwise found sufficient for all the purposes of this case, but no opinion is expressed in reference to the remaining $1,885,644.

Third. The final inquiry, whether the net earnings shown are in excess of or equal to a just return upon the investment, presents no serious difficulty, under the premises above stated. Assuming $5,000,000 as the basis of investment, the ratio of earnings would be as follows: (1) At the extreme computations of defendant, the yearly average would be $364,000, which would yield .072 per cent; (2) at the complainant's figures, after adding the corrections for taxes, the return would be .033 per cent; (3) at the amounts which are above stated as my deductions from the testimony, the yearly average, being $228,333, would make .045 per cent. Assuming $7,000,000 as the basis, the ratio of earnings would be, upon each of said versions, as follows: For the first, .052 per cent; for the second, .023 per cent; for the third, .032 per cent.

The interest rate fixed in the bonds issued by the company is 5 per cent. The rate which prevails in this market, as shown by the uncontroverted testimony, is 6 per cent for real estate mortagages and like securities. If the $5,000,000 basis be adopted, surely a better rate must be afforded for the risks of investment than can be obtained on securities of this class, in which there is no risk. Upon the basis of $7,000,000, which is more logical and just, the 5 per cent named in the bonds is clearly not excessive, and should be accepted by a court of equity as the minimum of allowance; and, even upon the defendant's partial showing, the return would be less than one-quarter per cent above that, with the large margin for depreciation left out of account.

I am of opinion that the testimony is not only convincing in support of the material allegations of the bill, but is uncontradicted and conclusive that the improved service received by the public, with the universal system of transfers, is well worth the five-cent rate charged therefor; that the company has not re-

ceived earnings in excess of an equitable allowance to the investors for the means necessarily invested in furnishing such service; that enforcement of the ordinance would deprive complainant of property rights, by preventing reasonable compensation for its service; and that, therefore, the ordinance clearly violates the Constitution of the Unied States, and is invalid. Decree must enter accordingly, and for an injunction as prayed in the bill.[1]

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4. Termination of Relation.

QUIMBY v. VANDERBILT, 17 N. Y. 306.

(1858)

Action on a contract to carry defendant from New York to San Francisco via defendant's steamer to the Isthmus of Panama, thence by Accessory Transit Co.'s conveyance to the Pacific, and to San Francisco by Pacific steamers. One agent acted for the three lines, but sold three separate tickets, and accounted separately to the proprietors of each line for the tickets sold on that line. Plaintiff was carried safely to the isthmus, but was not carried properly across and in consequence missed the Pacific steamer. The jury found that defendant had made a through contract and gave verdict for plaintiff.

By Court, Denio, J. The plaintiff relies upon an express contract by which, as he alleges, the defendant engaged to cause him to be carried from New York to San Francisco; and the single question of law involved in the case is whether there was evidence of such a contract proper to be submitted to the jury. If it should be conceded that there was no such connection between the three lines of transportation as would entitle the defendant, as the representative of the whole, to contract in their behalf for the carriage of persons and property the entire distance from New York to California, it was yet quite competent for him to bind himself to the plaintiff by an express contract, not only to carry him over his own proper portion of the line, but that the other transportation companies should successively take him up upon his arrival at the commencement of their respective routes, and carry him over the same until he

[1] Lien on baggage.—Schouler on Bailments & Carriers, § 582.

should arrive at his destination at San Francisco. The English courts hold that where property is embarked upon a railroad or other line of transportation, addressed to a place beyond the terminus of the line, but which may be reached by other lines of carriage running in connection with it, a contract arises between the first-mentioned company and the owner of the property that it shall be carried to its place of destination: Muschamp v. Lancaster and Preston Railway Company, 8 Mee. & W. 421; Watson v. Ambergate, etc., Railway Company, 3 Eng. L. & Eq. 497; and this court has determined that the agent of a railway company may bind his principals by a contract for carriage over other roads running in connection with his own: Hart v. Rensselaer and Saratoga Railroad Company, 8 N. Y. 37, 59 Am. Dec. 447. The late court of errors, in my opinion very wisely, limited the English rule above mentioned, by holding that evidence was admissible to show that by the course of business a transportation line receiving property without any express contract, undertook only to carry it over its own line, and then place it in the hands of the carriers over the next route, and that it discharged its obligation to the owners by delivering it to a responsible company next in order in its passage to the place of destination: Van Santvoord v. St. John, 6 Hill, 157. All the cases assume that the company to which the goods are delivered may lawfully contract for the performance of the other lines running in connection with its own, as well as for its proper route: and there is no difference in principle, in this respect, between contracts for the carriage of persons and for the transportation of property.

But the defendant's counsel contends that the tickets which the plaintiff received for the passage over the several routes are, in themselves, written evidence of the bargains by which he engaged his passage, and that he is precluded from contradicting them by parol testimony of an entire contract with the defendant. We do not think this a sound position. The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage-money; and their office is to serve as tokens to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board. They are quite consistent with a more special bargain. Being

the usual permits which were issued for the guidance of the masters of the vessels and the conductors of the carriages, they would necessarily be given to the passenger to facilitate the transaction of the business, whatever the nature of his arrangement for passage may have been. Their character as mere tokens is shown by the fact that the defendant received them in large numbers of the Transit company, not as an agent of that company for the purpose of making bargains in its behalf with others, but to furnish them to persons with whom he expected to deal on his own account. In Hart v. Rensselaer and Saratoga Railroad Company, just referred to, the plaintiff had separate tickets for each of the roads over which she traveled, but she was permitted to recover against one of the companies, though unable to show that her baggage was lost on the route of that company. We do not say that the receiving of separate tickets for the different lines is not evidence of some weight upon the question whether the contract was entire, but we hold that it does not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing.

There was positive evidence of a verbal contract between the plaintiff and Allen for carrying the former from New York to San Francisco. The plaintiff applied at the office to obtain such passage, and he was promised it for two hundred and fifty dollars. The tickets were then given him to secure his admission to the different vehicles of the line. In this Allen professed to act as the agent or clerk of some one. So far as the steamships on the Atlantic were concerned, he was the agent of the defendant, and no question is made but that he was authorized to bind the defendant thus far. It is equally clear to my mind that he was authorized to bind him by contracts for carrying passengers across the isthmus. The Transit company did not, as a general thing, sell any tickets to travelers; nor did they make any contracts for passage except with the defendant. To him they sold tickets, in the nature of permits for passage over their route, in such quantities as he chose to purchase. It is proved that neither he nor Allen were agents for the Transit company. When he dealt with a traveler, therefore, he bargained on his own account, and not on behalf of the Transit company. He might have charged more or less than he paid the company. It was certainly possible for him

to dispose of one of these permits by an arrangement with the passenger so special that the latter should have no recourse to him; but if he engaged in terms that the purchaser should be carried across the isthmus, and gave him one of the Transit company's tickets to show his title to be admitted on board their boats and carriages, he was the principal in that contract, and must answer for its breach. He placed these tickets in the hands of Allen, who was accustomed to deliver them to passengers in connection with such contracts as the one he made with the plaintiff. Allen admitted on his examination that he charged the gross sum of two hundred and fifty dollars for the entire passage, without any specification of the amount belonging to the separate branches of the line; and there is not the slightest evidence that on any occasion he sold the tickets to be taken at the risk of the passenger, or in connection with any arrangement except such as I have mentioned. The facts that the defendant purchased the tickets of the Transit company; that he placed them in the hands of his agent Allen for delivery to passengers; that the latter was accustomed to dispose of them in connection with contracts for passage over the entire route; and that he transacted the business in an office occupied also by the defendant, and acted under his general direction—were sufficient prima facie to charge the defendant as principal in these contracts.

As the detention, which prevented the plaintiff from reaching the steamship Independence before she sailed, occurred upon the isthmus, the defendant is chargeable in this action when it is shown that such detention was a breach of his contract, even though it should be held that the plaintiff contracted with other parties for his passage upon the Pacific coast. But I think there was sufficient evidence to enable the jury to find that the defendant was the principal in the contract which Allen made with the plaintiff for the entire passage. The terms of the card which was given to the plaintiff when he received his ticket, and of the advertisement which was posted at the door of the office, which the plaintiff read when he went to secure his passage, looked to contracts for the whole distance. The defendant's connection with the office and with Allen was sufficient prima facie to charge him with a knowledge of the contents of these papers, and he is to be looked upon as their author. Being known to both parties

to the contract for passage, they afford the means of ascertaining what that contract was if it were otherwise equivocal. If we add to this evidence the fact that the defendant was the owner of a moiety of two of the steamships which ran on the Pacific side, and that he was a party to the arrangement by which the Independence, owned substantially by the Schuylers, was employed in that navigation in connection with the other routes, a case was made out which was not only suitable for the consideration of the jury, but which, in our opinion, fully warranted the verdict which they gave.

The judgment of the court of common pleas should be affirmed.

All the judges concurred.

O'BRIEN v. BOSTON, ETC., R. CO., 15 Gray (Mass.) 20.

(1860)

Tort for wrongful ejection of a passenger. Plaintiff bought a round trip ticket from Cordaville to Brighton. He went to Brighton and thence beyond to Boston. The same day he boarded defendant's train to return from Boston to Cordaville, offered the conductor his return ticket from Brighton to Cordaville, but refused to pay fare either to Brighton or Cordaville. The conductor rang the bell and stopped the cars where there was no station and ejected him. Plaintiff offered to pay before and after the cars stopped, but the conductor refused it. Plaintiff again climbed on the cars and offered his fare, but the conductor again ejected him. The jury found the first ejection justifiable, but the second not, and gave $150 damages.

By Court, BIGELOW, J. The correctness of the instructions given to the jury in this case can be readily ascertained by considering the nature of the contract entered into between the plaintiff and the defendants, and the respective rights and duties of the parties under it. On entering the cars of the defendants at Boston, the plaintiff had a right to be carried thence to his place of destination in that train on paying the usual rate of fare. This fare he was bound to pay, according to the regulations of the company, or on a reasonable demand being made therefor; if he failed to do so, then his rights under the contract ceased;

he had forfeited them by his own act; and having himself first broken the contract, he could not insist on its fulfillment by the defendants. This is the rule of common law. It is also expressly enacted in statutes of 1849, chapter 91, section 2, that no person who shall not upon demand first pay the established toll or fare shall be entitled to be transported over a railroad. The defendants therefore were not bound to transport him farther, but were justified in ejecting him from the cars by the use of all lawful and proper means; Angell on Carriers, sec. 525, 609; Redfield on Railways, 26, 261; Stephen v. Smith, 29 Vt. 160. Nor could he regain his right to ask of the defendants to perform their contract by his offer to pay fare after his ejection. They were not bound to accept a performance after a breach. The right to demand the complete execution of the contract by the defendants was defeated by the refusal of the plaintiff to do that which was either a condition precedent or a concurrent consideration on his part, and the non-performance of which absolved the defendants of all obligation to fulfill the contract. After being rightfully expelled from the train, he could not again enter the same cars and require the defendants to perform the same contract which he had previously broken. The right to refuse to transport the plaintiff farther, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party, who had hitherto refused to perform the contract by paying his fare when duly demanded, could immediately reenter the cars and claim the fulfillment of the original contract by the defendants. Besides, the defendants are not bound to receive passengers at any part of their route, but only at the regular stations or appointed places on the line of the road established by them at reasonable distances for the proper accommodation of the public: Angell on Carriers, sec. 527 a; Murch v. Concord R. R. Corp., 29 N. H. 39, 61 Am. Dec. 631. The plaintiff had therefore no right to enter the cars at the place where the train was stopped for the purpose of ejecting him. A person who had committed no breach of contract could not claim any such right; a fortiori the plaintiff could not. It follows that, on the facts stated in the exceptions, the plaintiff proved no just claim for damages against the defendants, and the instructions given to the jury, under which the verdict was rendered, were clearly erroneous.

The court also erred in rejecting the evidence of the regulations established by the defendants concerning passengers who refused to pay their fare. The right to establish all needful and proper regulations is vested in the defendants by law: R. S., c. 39, sec. 83; Commonwealth v. Power, 7 Met. 602, 41 Am. Dec. 465. And they should have been permitted to prove them as part of their justification.

Exceptions sustained.

COMMONWEALTH v. BOSTON & MAINE R. R. CO.,

129 Mass. 500.

(1880)

Conviction, under a statute, of causing the death of a passenger.

SOULE, J. It is contended on the part of the government, that where the person killed was a passenger, the statute does not require, in order to the maintenance of an indictment, that he should have been using due care. But whether this is so or not need not be decided, because, in the opinion of a majority of the court, when Hill was killed he was not a passenger within the meaning of the statute.

It is undoubtedly true that one who has bought a ticket, or otherwise become entitled to transportation on a particular train of cars of a railroad corporation, is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket office or waiting room in the station to take his seat in a car of the train, till he has reached the station to which he is entitled to be carried, and has had an opportunity, by safe and convenient means, to leave the train and roadway of the corporation at that station. Warren v. Fitchburg Railroad, 8 Allen, 227, 85 Am. D. 700. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful enginemen, conductors and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses to abandon his journey at any point before reaching the place to which he

is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of traveling farther. And while it is true, that if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so, he assumes all risk of injury. Gavett v. Manchester & Lawrence Railroad, 16 Gray, 501, 77 Am. D. 422. It would not be contended by anyone that an indictment under the statute could be maintained against a railroad corporation for causing the death of one who without looking to see if the track was clear, jumped from a train which was running at ordinary speed between stations, and was immediately afterward killed by the engine of a train going in the opposite direction on another track. The indictment would fail because the facts showed that the corporation owed no duty to the deceased. He would have ceased to be a passenger, by voluntarily leaving the train at a place and time when and where the corporation could not anticipate that he would leave it, and when and where the corporation was under no obligation to see that he had an opportunity to leave its roadway in safety after leaving the train. He would have become an intruder on the track of the corporation, acting without any regard to the dangerous character of the situation, and not entitled to protection against the consequences of his own negligence. The principle involved in the supposed case is involved in and governs the case at bar.

So long as the train was in motion, Hill could not leave it and still retain his right to protection till he had left the roadway of the corporation. By leaving the train while in motion, he ceased to be a passenger, and to have the rights of a passenger, as completely, though the train was moving slowly, and was near by the station, as if he had left it while moving at full speed between stations. Hickey v. Boston & Lowell Railroad, 14 Allen, 429. The fact that the car in which Hill was had passed the platform of the station to which he was entitled to be carried did not give him the right to leave the train at the risk of the company. If he sustained any injury by being carried beyond the station, his remedy would be by an action, counting on that injury. * * *

It follows that the defendant was right in asking the ruling that there was no sufficient evidence to support either count of the indictment. There was no evidence to support the counts in which Hill is alleged to have been a passenger, because by his voluntary act he had ceased to be a passenger, or to be entitled to protection as a passenger. There was no evidence to support the counts in which he is alleged not to have been a passenger, because there was no evidence that he was in the exercise of due care.

Exceptions sustained.

DODGE v. BOSTON, ETC., Co., 148 Mass. 207; 19 N. E. R. 373.

(1889)

Tort to recover damages for personal injuries received by plaintiff while a passenger by a small plank provided for the use of employes only. He wished to secure breakfast at a restaurant on the wharf. Meals were served to those who paid for them on the boat.

KNOWLTON, J. This case presents an important question as to the rights and duties of passengers and common carriers in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when

the passenger at the end of his journey has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged, and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and been put in a freight-house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time; and this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments: Peniston v. Chicago, etc., R. R., 34 La. Ann. 777, 44 Am. R. 444; Jeffersonville, etc., R. R. v. Riley, 39 Ind. 568. So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop, he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey, he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger, without losing his rights while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over a railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting

from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping-place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties.

In the case of Keokuk Northern Line Packet Co. v. True, 88 Ill. 608, a plaintiff before reaching his destination was going ashore for his own convenience at a place where the boat stopped for two hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. See also Clussman v. Long Island R. R., 9 Hun. 618, affirmed in 73 N. Y. 606; Hrebrik v. Carr, 29 Fed. Rep. 298; Dice v. Willamette Transportation and Locks Co., 8 Or. 60, 34 Am. R. 575. In the first of these cases, the defendant was held liable for a defect in a platform of its station to a passenger who had left the train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury, or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco, and fell from an unsafe plank, and was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover.

No decision has been cited that conflicts with our views. In State v. Grand Trunk R'y, 58 Me. 176, 4 Am. R. 258, the circumstances under which the passenger left the train and remained away from it were such that, applying the principles we have enunciated, he was not a passenger at the time he was killed. The court, in that case, was not called upon to consider at what point a passenger leaving a car under different circumstances would cease to be such, and at what point he would resume his former relation.

Upon the undisputed facts of the case at bar, we are of opinion that the plaintiff, as a passenger, could properly go on shore to get his breakfast at Rockland, and that he had a passenger's rights to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers of passengers, as distinguished from the ordinary care required of men in their common relations to each other. Because a passenger's life and safety are necessarily entrusted, in a great degree, to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule is held not only in our own state and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage-coaches, steam-boats, and sailing-vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger.

In Readhead v. Midland R'y, L. R. 2 Q. B. 412, it is said that a "carrier of passengers for hire was bound to use the utmost care, skill and diligence in everything that concerned the safety of passengers." In R. R. Co. v. Aspell, 23 Pa. St. 147, 62 Am. D. 323, carriers of passengers are said to be responsible for "any species of negligence, however slight, which they or their agents may be guilty of." In Warren v. Fitchburg R. R., 8 Allen (Mass.) 227, 85 Am. D. 700, the principle was applied to providing for a passenger a safe and convenient way and manner of access to the train. In Simons v. New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. D. 99, it was applied to the duty of a carrier to protect passengers from the misconduct or negligence of other passengers.

Gaynor v. Old Colony, etc., R'y, 100 Mass. 208, 97 Am. D. 96, was a case where it appeared that the defendant did not provide proper safeguards against injury for a passenger leaving the place where he alighted from the cars. Mr. Justice Colt said in the opinion: "The plaintiff was a passenger, and while that relation existed, the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection, so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction, and arrangement of their station buildings, platforms, and means of egrees as in their previous transportation." See also language of Chief Justice Shaw, in McElroy v. Nashua, etc., R. R., 4 Cush. (Mass.) 400, 50 Am. D. 794.

Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions, "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these, are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular, it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars: Warren v. Fitchburg R. R., 8 Allen (Mass.) 227, 85 Am. D. 700; Le Barron v. East Boston Ferry Co., 11 Allen (Mass.) 312, 315, 87 Am. D. 717; Taylor v. Grand Trunk R'y, 48 N. H. 304, 316, 2 Am. R. 229; Tuller v. Talbot, 23 Ill. 298, 76 Am. D. 695.

It may be assumed that the plaintiff would have ceased for the time to be a passenger, if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused. For, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip. It was the same in either place. But in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances. The decision in Moreland v. Boston, etc., R. R., 141 Mass. 31, 6 N. E. R. 225, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed, that the defendant had provided a safe and convenient place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use by passengers. The judge said in his charge: "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck, nor do I understand that the plaintiff now claims that the defendant intended the gangway, which was in fact used by the plaintiff, for use by passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case, and, upon these facts, a warning to the plaintiff not to leave the steamer from the gangway by which he went was a reasonable order or regulation. A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety when acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it.

This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law; Ellis v. Nar-

ragansett Steamship Co., 111 Mass. 146; Pennsylvania R. R. v. Zebe, 33 Pa. St. 318; McDonald v. Chicago, etc., R. R., 26 Iowa 124, 142, 96 Am. D. 114; Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. R. 716. We are of opinion that the jury should have been instructed in accordance with it. It was not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case, which involved a consideration of all the evidence relative to that phase of it. And if by the word "notified," in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request. No instructions were given upon this subject, and because of this error the entry must be, exceptions sustained.[1]

[1] Remaining in station after leaving train.—14 Harv. L. Rev. 541.

CHAPTER XI.

TELEPHONE, TELEGRAPH, GAS, ELECTRIC, ETC., COMPANIES

1. Creation of Relation.

EVERGREEN CEMETERY ASSOCIATION v. BEECHER. 53 Conn. 551.

(1885)

Pardee, J. This is a complaint asking leave to take land for cemetery purposes by right of eminent domain. The case has been reserved for our advice.

The plaintiff is the owner of a cemetery, and desires to enlarge it by taking several adjoining pieces of land, each owned by a different person, and has made these owners joint defendants. Because of this joinder they demur. But we think that it is in harmony with our practice in analogous proceedings and with the spirit of the Practice Act, and that it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights. Each carries his own burden only; he is not made to carry that of any of his associates. Therefore the complaint, so far forth as this objection is concerned, is sufficient.

The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demand. In order to secure for burial places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing.

maintaining, and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless, it remains a public use as long as all persons have the same measure of right for the same measure of money.

But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain. The complaint alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion.

Therefore the Superior Court is advised that for the reason that the complaint does not set out any right in the plaintiffs to acquire title to the land of the defendants otherwise than by their voluntary deed, the demurrer must be sustained.

In this opinion the other judges concurred.

PORTLAND NATURAL GAS AND OIL CO. v. STATE.

135 Ind. 54.

(1893)

COFFEY, J. This was an action by the appellee against the appellant, to compel the latter by mandamus to supply the residence of the relator with natural gas, to be used for lights and fuel.

It appears, from the complaint, that the appellant is a corporation, duly organized under the laws of this State, for the purpose,

among others, of supplying to those within its reach natural gas, to be used for lights and fuel. By permission of the common council it has laid its pipes, for that purpose, in the streets and alleys of the city of Portland, in this State, and has pipes laid in Walnut Street, of that city. The relator resides on Walnut Street, on the line of one of the appellant's main pipes. His house is properly and safely plumbed for the purpose of obtaining natural gas.

In May, 1890, the relator demanded of the appellant gas service, and tendered to it the usual and proper charges for such service, but it refused, by its officers, to furnish the gas demanded, whereupon this suit was brought to compel it to furnish the gas desired by the relator.

The court overruled a demurrer to the complaint. It also sustained a demurrer to the second, third, and fourth paragraphs of the answer filed by the appellant. Over a motion for a new trial, the court awarded a peremptory writ against the appellant, requiring it to furnish the relator with gas, as prayed in the complaint.

Very many of the objections urged against the complaint go to the question of its uncertainty, and are technical in character. It has been so often decided that a demurrer is not the remedy for uncertainty that we need not cite authority upon the subject.

These several rulings are assigned as error.

The vital question in the case relates to the right of the relator to compel the appellant, by mandamus, to supply his dwelling house with natural gas for lights and fuel.

There are cases which hold that in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise, among which is the case of Commonwealth v. Lowell Gas Light Co., 12 Allen, 75; but we think the better reason, as well as the weight of authority, is against this holding.

Mr. Beach, in his work on Private Corporations, volume 2, section 835, says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public

duties. Their use of the streets, whose fee is held by the municipal corporation, in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected."

Mr. Cook, in his work on Stock and Stockholders, section 674 (2d ed.), says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all."

To the same effect are the following adjudicated cases: State v. Columbus Gas, &c. Co., 34 Oh. St. 572; New Orleans, &c. Co. v. Louisiana Light Co., 115 U. S. 650; People, ex rel., v. Manhattan, &c. Co., 45 Barb. 136; Gibbs v. Consolidated Gas Co., 130 U. S. 396; Williams v. Mutual Gas Co., 52 Mich. 499; In re Rochester Natural Gas, &c., Co. v. Richardson, 63 Barb. 437.

Our General Assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain, by an act approved February 20, 1889, Acts 1889, p. 22.

It has often been held that mandamus is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Am. and Eng. Encyc. of Law, 1284-1289; People v. Manhattan Gas Light Co., supra; Williams v. Mutual Gas Co., supra; Rochester Natural Gas, &c. Co. v. Richardson, supra.

In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus. As to the sufficiency of an answer averring that the company had not a sufficient supply to furnish all those demanding gas, we intimate no opinion, as no such defense was interposed in this case.

It follows that the complaint in this case states a cause of action against the appellant, and that the court did not err in overruling the demurrer thereto.

Judgment affirmed.

2. Obligations.

a. Obligation to Serve All Occupiers, etc.

FERGUSON v. THE METROPOLITAN GAS L. CO.,

37 How. Pr. (N. Y.) 189.

(1868)

By the Court, Brady, J. The plaintiff occupied one floor of a dwelling or tenement house in this city. The owner had put in it the service pipes for gas, according to the regulations of the defendants. He applied for gas which was supplied through one meter, placed in the cellar of the house. He also applied for separate meters for each floor, which were not furnished by the defendants, and it would seem because he had not put into the house separate or independent service pipes for each floor to which the meter might be connected.

It does not appear that, this application being refused, he took any steps to enforce his demand.

It is conceded that the pipes in the house were sufficient to serve it with gas, and that gas could be carried to all parts of it through them.

The plaintiff when he became an occupant also applied for gas, and the defendants answered by saying that they had already furnished it to the building, and refused to place a meter on the plaintiff's floor unless separate and independent service pipes were provided. The plaintiff's application was not in fact alone for gas, but for a separate meter as well. He wanted the meter, as he stated on the trial, and the question really involved in this controversy is, whether the defendants were bound to furnish it.

The plaintiff sues for a penalty under the sixth section of the act of 1859 (Laws, p. 698), which provides that all gas companies shall supply gas to the owner or occupant of any building or premises, which may be required for lighting it or them, upon a written application therefor to be signed by him. It also provides, that if for the space of ten days after such application, and the deposit of a reasonable sum, as in the act provided (if required), the company shall refuse or neglect to supply gas, they shall pay to the applicant the sum of ten dollars and five dollars for every day thereafter during which such neglect or refusal shall continue.

It will be observed that there is no qualification on the obligation imposed by the statute. The gas must be furnished or a penalty is incurred, which continues from day to day, as long as the refusal or neglect to supply it is continued. It will also be observed that the section referred to does not either directly or indirectly require the company to furnish a meter, either to the owner or occupant, for the whole or any part of the premises, and the act is equally silent as to the mode by which the gas shall be conveyed through the houses.

The plaintiff seeks the enforcement of a penalty, and whether the statute be regarded as penal or remedial, and one either to be strictly or liberally construed, his claim is not within its purview. Assuming that he is the occupant of premises within the meaning of the statute, which may well be questioned, and that he had the right to apply for gas, the answer to his demand is, that gas was supplied through the pipes provided by his landlord, which he could use if he chose to do so, and the response disposes of his claim. The owner of the building had exhausted the power to compel the defendants to furnish gas, under section six of the act referred to. They had granted his application for it, although they had declined to furnish separate meters, a neglect or refusal of which to him he alone could take advantage of. The gas having been thus furnished, no penalty was incurred by them, unless the omission to supply a meter to the plaintiff is fairly within the application for gas and included in it.

This cannot be. The meter is employed for the benefit not of the consumer but the company, and cannot be used without tests which the former may insist shall be applied (§ 5). If the company prefer, they may supply the gas without it, for aught that appears in this case. The statute does not require them to furnish it, and that in itself may be sufficient to dispose of this case. If the statute be strictly construed, the defendants are not liable, because they have furnished gas to the building which includes the premises occupied by the plaintiff, and which only they were bound to furnish, and if it be liberally enforced, then the defendants should not be obliged to provide an article which is not required by the letter of the law, nor necessary to the plaintiff for the enjoyment of the light which he desires, nor should such a construction create a duty which under its provisions is not declared.

It must be said in addition, that if it were otherwise considered, that the defendants should not be prohibited from adopting reasonable rules with reference to the introduction of gas, protective of their own interests.

They proved on the trial, that it was not customary to put in separate meters such as demanded by the plaintiff, without separate service pipes, and that they were necessary to prevent "tapping," which would result in a fraud upon their rights. The legislature has by various provisions in the act of 1859 sought to guard them against fraud and theft, and has taken the lead in anticipating violations of fair dealing, against which corporations as well as natural persons are guaranteed under our laws, the right to protect themselves, even in the discharge of duties imposed upon them.

For these reasons the judgment should be reversed.

STATE v. NEBRASKA TELEPHONE CO., 17 Neb. 126.

(1885)

REESE, J.[1] This is an original application for a mandamus to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice.

It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterwards the relator applied to the agent of the respondent and requested to become a subscriber and to have an instrument placed in his

[1] Abridged.—

place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist.

We cannot see that the relations of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits, will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.

The pleadings and proofs show that the relator is an attorney-at-law in Lincoln, Nebraska. That he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in southeastern Nebraska. That this territory is occupied by respondent exclusively, together with a large portion of southwestern Iowa, including in all about fifteen hundred different instruments.

By the testimony of one of the principal witnesses for respondent we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the State, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand

or necessity in commerce the respondent proposes satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the State, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day make the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist in many cases sufficient reason for failing to comply with such a demand, but they are not shown to exist in this case. It is shown to be essential to the business interests of relator that his office be furnished with a telephone. The value of such property is, of course, conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that

he is entitled to and may use such telephone to its full extent by coming there. That, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations, that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate, the demand which it proposes to supply. It has so assumed and undertaken to the public.

That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been udertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are

demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when those principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone; "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

A peremptory writ of mandamus must be awarded.

CHESAPEAKE, ETC., TELEPHONE CO. v. BALTIMORE, ETC., TELEGRAPH CO., 66 Md. 399.

(1887)

ALVEY, C. J. This was an application by the appellee, a telegraph company, to the court below for a mandamus, which was accordingly ordered, against the appellant, another telegraph company, but doing a general telephone business.

The appellant appears to be an auxiliary company, operating the Telephone Exchange under the patents known as the Bell patents. Those patents, formerly held by the National Bell Telephone Company, are now held by the American Bell Telephone Company, a corporation created under the law of the State of Massachusetts. The patents, with the contracts relating thereto, were assigned by the former to the latter company prior to the 23d of May, 1882, and it is under a contract, of the date just mentioned, that the appellant acquired a right to use the patented devices in the operation of its system of telephonic exchanges.

In the agreed statement of facts, it is admitted that all the telephones used by the Chesapeake and Potomac Telephone Company (a company to which the appellant is an auxiliary organization), and also all the telephones used by the appellant

in its Exchange in the City of Baltimore, and elsewhere in the State, are the property of the American Bell Telephone Company. It is alleged by the appellee and admitted by the appellant, that the offices of the Western Union Telegraph Company of Baltimore City are connected with the Telephone Exchange of the appellant, and that when a subscriber to the Telephone Exchange wishes to send a message by way of the lines of the Western Union Telegraph Company, the subscriber calls up the Telephone Exchange, and the agent there connects him with the office of the Western Union Telegraph Company, and the subscriber thereupon telephones his message over the lines of the appellant, to the Western Union Telegraph office; and a like process is repeated when a message is received by the Western Union Telegraph Company for a subscriber to the Telephone Exchange of the appellant. The appellee is a competing company, in the general telegraph business, with the Western Union Telegraph Company. And being such, it made application to the appellant to have a telephone instrument placed in its receiving room in Baltimore, and that the same might be connected with the Central Exchange of the appellant in that city; so that the appellee might be placed upon the same and equal footing with the Western Union Telegraph Company, in conducting its business. This request was refused, unless the connection be accepted under certain conditions and restrictions, to be specially embodied in a contract between the two companies, and which conditions and restrictions do not apply in the case of the Western Union Telegraph Company.

It appears that there were conflicting claims existing as to priority of invention, and alleged infringement of patent rights, which were involved in a controversy between the Western Union Telegraph Company and others, and the National Bell Telephone Company, to whose rights the American Bell Telephone Company succeeded; and in order to adjust those conflicting pretensions, the contract of the 10th of Nov., 1879, was entered into by the several parties concerned. The contract * * * stipulated (Art. 13, cl. 1) that the right to connect district or exchange systems, and the right to use telephones on all lines, should remain exclusively with the National Bell Telephone Company (subsequently the American Bell Telephone Company), and those licensed by it for the purpose, but it was

in terms provided that "such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news, for sale or publication, in competition with the business of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company. * * * The contract of the 23rd of May, 1882, under which the appellant derives its right to the use of the patented instruments, was made in subordination to the prior contract of the 10th of Nov., 1879, and contains a provision to conform to the restrictions and conditions just quoted. * * *

These contracts are pleaded and relied on by the appellant as affording a full justification for exacting from the appellee a condition in the contract of subscription to the Exchange, that the latter should observe the restrictions in favor of the Western Union Telegraph Company. The appellant contends that these restrictive conditions in the contracts recited are binding upon it, and that it is not at liberty to furnish to the appellant, being a telegraph company, the instruments applied for and place them in connection with the Exchange, unless it be subject to the restrictive conditions prescribed. And if this be so, the Court below was in error in ordering the mandamus to issue. But is the contention of the appellant well founded, in view of the nature of the service that it has undertaken to perform?

The appellant is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. In this case, the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules

and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and, as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within this State (which, as we have seen, includes a telephone exchange) "to receive dispatches from and for any telegraph lines, associations, or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And such being the plain duty of those owning or operating telegraph lines, or telephone lines and exchanges, within this State, they cannot be exonerated from the performance of that duty, by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the Legislature of the State has full power to regulate and control, within reasonable limits at least, public employments and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce, and the affairs, both public and private, of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And such being the case, the owner of the property thus devoted to public use, must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of Munn v. Illinois, 94 U. S. 113, and which has been followed by subsequent cases. In the recent case of Hockett v. State, 105 Ind. 250, where the cases upon this subject are largely collected, it was held, applying the principle of Munn v. Illinois, that it was competent to the State to limit the price which telephone companies might

charge for their patented facilities afforded to their customers. And if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.[1]

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b. Obligation to Provide Reasonably Adequate Facilities and Service.

SEARLES v. MANN BOUDOIR CAR CO., 45 Fed. Rep. 330.

(1891)

Action to recover damages for alleged wrongful refusal of defendant's conductor to sell plaintiff a berth in a sleeping-car. On the 30th day of June, 1888, plaintiff entered defendant's sleeping-car at Meridian, Miss., and applied to the sleeping-car conductor for a berth. He received answer that all the space was sold, and he could not be accommodated. He claimed that there was a vacant upper berth that he should have. This upper berth was part of a section that had been bought by a Mr. Watson, to whom plaintiff applied for the upper berth, and was refused. There was a rule of defendant company to the effect that no one party could retain an entire section when there were applicants for berths.

HILL, J. (charging jury). The issues which you are to determine from the evidence, are: First. Did the conductor of the sleeping-car then owned and operated by the defendant company unlawfully and wrongfully refuse to sell to the plaintiff a ticket entitling him to the use and occupation of one berth in said car from meridian, in this State, to Cincinnati, in the State of Ohio, as alleged in the declaration, and denied in the plea of defendant? To entitle the plaintiff to a verdict in his favor the burden is upon him to reasonably satisfy you from the evidence that the conductor then in charge of said car did unlawfully and wrongfully refuse to sell plaintiff such ticket, and place him

[1] Obligation of water companies, gas companies, electric companies and telephone companies limited to occupiers.—23 Harv. L. Rev. 346-351; See, also, Chap. VII.
Wyman, Public Service Corporations, §§ 373-380.
Territorial limits on service professed.—Wyman, Public Service Corporations, §§ 273-282.

in possession of one berth in said car. The uncontradicted testimony is that soon after the train to which the sleeper was attached left Meridian the plaintiff did apply to the conductor for a berth in the sleeper from Meridian to Cincinnati, and tendered him the money for the fare; to which the conductor replied that he had no vacant berth at his disposal, but that there was one berth in a section (or room, as they are constructed on this class of sleepers), all of which section had been purchased and paid for in New Orleans, and which upper berth was not then occupied by the purchaser, and who had only purchased the berth to Birmingham, Ala.; that if plaintiff would apply to Mr. Watson, the purchaser and occupant, he thought he would let plaintiff have it; to which plaintiff replied that he had the right to it, and demanded it on such right; to which the conductor replied that Mr. Watson had the right to its use to Birmingham, and that he could not deprive him of it, but that he would ask him for it for the use of the plaintiff. He did so apply, and Watson refused to surrender the use of the berth to the plaintiff. These facts being admitted, you are instructed that the defendant company had the right to sell the use of the whole section or room to Watson, and, having done so, and received the pay for it, Watson was entitled to the use of the entire section for himself and such other persons as he might choose, and who was otherwise a proper person to occupy the sleeper to Birmingham, Ala., and that the conductor was guilty of no wrong in refusing to sell the use of this berth to the plaintiff, and put him in possession of it; and therefore you are instructed to return your verdict in favor of the defendant on the issue on the first count in the declaration.

The second issue which you will determine from the evidence is: Did the conductor unlawfully and wrongfully refuse to sell the plaintiff a ticket entitling him to the use of one berth on the sleeper from Birmingham to Cincinnati, as alleged in the second count in the declaration, and denied by the plea of the defendant? The burden of proving this allegation in the plaintiff's declaration is on him. There being some conflict in the testimony on this point, you are instructed that, while the conductor might have sold to plaintiff a ticket entitling him to the use of this berth from Birmingham to Cincinnati before reaching the former place, he was not under any obligation to do so, and his refusal

so to do created no liability upon the defendant; but that, when the train arrived at Birmingham, and Watson's right of occupancy had ceased, and the paintiff had applied for this or any other vacant and unoccupied berth in the sleeper, and tendered the usual fare for the use of it, and was refused by the conductor, then such refusal would have been wrongful, and the finding on this issue should be for the plaintiff, and entitle him to such reasonable, actual damages as in your judgment, from the proof, he has sustained by reason of being deprived of the use of the berth from Birmingham to Cincinnati, less the amount of the fare. You are further instructed that if the proof shows that application had been made for a berth in the sleeper by another man at Meridian, before the plaintiff made application, then the conductor had the right to sell the ticket for the berth to him in preference to the plaintiff. You are the sole judges of the weight to be given to the testimony of the witnesses on both sides. You will reconcile any conflict that may exist in the testimony of the witnesses, if you can; if not, then you will determine from all the testimony which most probably gave the facts truly. In considering the testimony you will consider the interest each witness may have in the result of your verdict, the manner in which they have testified, and the reasonableness of their statements in connection with all the testimony.

The jury returned a verdict in favor of defendant on both counts of the declaration.

GARDNER v. PROVIDENCE TELEPHONE CO., 23 R. I. 312.

(1901)

PER CURIAM. The evidence shows, as stated by the complainant, that the defendant refuses to furnish a long-distance extension set in connection with a grounded telephone circuit. The evidence does not convince a majority of the court that such a combination can be made generally without impairment of the service. The uniform practice of the company is against this contention. The company offers to annex to the complainant's grounded circuit, for a reasonable price, such an extension set as is appropriate for the circuit, and which it contends will give

satisfactory service. This is all that the complainant can demand. He is in default in not requesting the company to provide what it says it is willing to give him, and in insisting on the exact form of apparatus which he has installed. It is for the company, not for the subscriber, to determine the type of apparatus it shall use, and there is no evidence that the type it offers is inadequate. These points were fully considered by the court upon the former hearing, as a careful examination of the opinion will show. It may further be observed that in this case there is no evidence that the defendant's charge for a metallic circuit combined with a long-distance set is exorbitant. The well-known superiority of a metallic circuit to a grounded one in all essential features, and the greater cost of construction, make it reasonable to charge more for the use of the metallic circuit than for the other. The question of price is not strictly before the court, for the complainant does not desire this kind of service, and the defendant will not tolerate the combination which the complaint has made at any price.

The motion for re-argument is denied.[1]

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c. Obligation to Refrain from Discrimination.

LADD v. BOSTON, 170 Mass. 332.

(1898)

Bill in equity.

The plaintiff is the owner of a building on Pemberton Square in Boston, and the defendant supplies the water to be used therein. The defendant has established, and still continues, fixture rates and meter rates, in accordance with which it requires water takers to pay for the water they use. Many years ago the defendant put a water meter into the building owned by the plaintiff, and has maintained the same there ever since. At the time the meter was put in, the plaintiff, relying upon its continuance, supplied his building very liberally with water fixtures. By the meter rates, the water used in the building amounts to about five dollars each year, but the plaintiff has always paid fifteen dollars per annum, that being the minimum meter rate.

[1] Provision of adequate facilities.—Wyman, Public Service Corporations.—§§ 790-826.

The defendant has recently adopted a policy of removing all meters where it would receive more money from fixture rates, without any regard to the injustice it will work to certain water takers. In accordance with such policy, it now threatens to remove said meter and put the building upon fixture rates, and to shut off the water unless the paintiff allows it to do so. By fixture rates for all the fixtures in the building in actual use the plaintiff would be required to pay about one hundred and five dollars per annum. The water fixtures in the building cannot be lessened or rearranged without very great expense, and in no way can they be so lessened or rearranged as to make the fixture rate in any sense reasonable for the quantity of water used. The income from the building has largely decreased in the last few years, and is not sufficient to warrant the payment of such excessive water taxation.

If the building is placed upon fixture rates, the plaintiff will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water.

KNOWLTON, J. * * * Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit obtained from it, the number of persons who want it for such a use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city, and upon the interests of property-holders, are all to be considered. Under any general and uniform system other than measuring the water, some will pay more per gallon than others.

It appears by the bill that the plaintiff has so arranged fixtures in his building that he and his tenants can obtain the convenience and benefit of having water to use in many places, while the quantity which they want to use in the whole building, paid for at the rate per gallon charged for measured water, would cost only five dollars per year. He has been accustomed to pay fifteen dollars per year, because, however small the quantity used, that is the lowest sum per year for which water will be furnished under the rules through any meter.

The only averment in the bill which tends to show that the charge for his building after the meter is removed will be unreasonable, is that he "will be obliged to pay more than twenty times as much as other water takers pay for the same quantity of water." This means that the arrangement of fixtures in his building is such that, paying by the fixture at the ordinary rate, the aggregate quantity used will be so small as to make the price per gallon twenty times as much as the price paid for measured water where meters are allowed to be used, or the lowest price paid at rates by the fixture where the largest quantities are used through the fixtures. This does not show that charging by the fixture is an improper method. It only shows that the number and arrangement of the fixtures in the plaintiff's building are uneconomical for the owner as compared with a different construction and arrangement of the conveniences for using water in some other buildings.

The rights of the parties are not affected by the fact that the plaintiff was using a meter when he put in his fixtures. He knew that he had no contract for the future with the city in regard to the mode of fixing the price to be paid for water, and it appears that the quantity which he has been using is only about a third of the smallest quantity for which water is ever charged by the gallon, running through a meter.

The bill does not state a case for relief in equity.

Bill dismissed.[1]

BAILY v. FAYETTE GAS-FUEL CO., 193 Pa. St. 175.

(1899)

On September 21, 23, and 24, 1898, the defendant company caused to be inserted in the Daily News Standard, published in Uniontown, an advertisement, notifying domestic consumers of natural gas that after October 1, 1898, the rates for gas would be as follows: For heat, twenty-five cents per 1,000 cubic feet; for light, $1.50 per 1,000 cubic feet; and requiring all consumers desiring to use gas for light to notify the company immediately that the light meters might be set. At or about the same time similar notices were mailed to the company's customers. The

[1] See chapter VII.

plaintiff, a resident of Uniontown, saw the notice as published and also received one by mail. On or about October 3, 1898, an employe of the defendant company notified the plaintiff orally that if he did not call immediately at the defendant's office and make arrangements for using the gas for illumination the gas would be shut off, whereupon the plaintiff filed the bill in this case, alleging that the proposed difference in charge for gas used for illuminating and heating purposes is an unjust and unlawful discrimination, and an unreasonable regulation, not made in good faith, but for the benefit of other corporations; that the proposed action of the defendant would be a violation of the plaintiff's rights and the defendant's duties and would work a continuous and irreparable injury to the plaintiff, and praying that the defendant be restrained from shutting off plaintiff's supply of natural gas and from any interference with the connection between its mains or supply pipe and plaintiff's premises, which would prevent him from using natural gas for either heating or illuminating purposes, so long as the plaintiff continues to pay the usual rates charged generally for gas, without discriminating as to the use thereof for illuminating purposes, &c.

MITCHELL, J. The defendant company was chartered under the Act of May 29, 1885, P. L. 29, to produce, transport, supply, &c., natural gas for heat, light, or other purposes. It has been supplying the gas for both heat and light, and proposes to continue doing so, but upon terms making a difference in price according to the use to which the gas is put by the consumer. The question now before us is the reasonableness of this regulation.

In his opinion the learned judge below said, "So far as concerns this case the defendant company may be regarded as incorporated for the purpose of supplying natural gas to consumers for heat and light." Not only did its charter powers cover both uses, but as already said its actual operation has included both, and it is not intended now to abandon either, even if that could be done. The corporate powers are the measure of corporate duties.

The gas is brought by the company through the same pipes for both purposes and delivered to the customers at the same point, the curb. Thence it goes into pipes put in by the consumer, and, after passing through a meter, is distributed by the customer

through his premises according to his own convenience. The regulation in question seeks to differentiate the price according to the use for heating or for light. It is not claimed that there is any difference in the cost of the product to the company, the expense of supplying it at the point of delivery or its value to the company in the increase of business or other ways. Some effort was made to show increased risk to the company from the use of gas for lighting purposes, but the evidence of danger was so remote and shadowy that it cannot be considered as more than a mere makeweight. The real argument seeks to justify the difference in price solely by the value of the gas to the consumer, as measured by what he would have to pay for a substitute for one purpose or the other if he could not get the gas. This is a wholly inadmissible basis of discrimination.

The implied condition of the grant of all corporate franchises of even quasi-public nature is that they shall be exercised without individual discrimination in behalf of all who desire. From the inception of the rules applied in early days to innkeepers and common carriers down to the present day of enormous growth of corporations for nearly every conceivable purpose, there has been no departure from this principle. And from all the legion of cases upon this subject the distinguished counsel for the appellee have not been able to cite a single one in which a discrimination based solely on the value of the service to the customer has been sustained. Hoover v. Penna. R. Co., 156 Pa. 220, was much relied on by the court below, but was decided on a very different principle. That was an action for damages for unlawful discrimination by a dealer in coal, because a manufacturing company had been allowed a rebate on coal carried to it. But it was held that as the rebate was allowed in consideration of a minimum of coal to be carried per day, and also in view of return freight on the product of the manufacturing company, it was not an unreasonable discrimination; in other words, that the company might look for its compensation not only to the actual money freights from present service, but also to increased business to grow out of the establishment of a new industry in that place. So also Phipps v. London & North Western Ry. Co., L. R. 1892, 2 Q. B. 229, cited for appellee, where the decision was put upon the right of the railroad to make special rates for freights from distant points which otherwise it could not get

at all. Both cases belong to the numerous class of discrimination sustained on the basis of special advantages to the carrier, not the customer.

Decree reversed, injunction directed to be reinstated and made permanent. Costs to be paid by appellee.

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d. Obligation to Make Reasonable Charges.[1]

BRYMER v. BUTLER WATER CO., 179 Pt. St. 231.

(1897)

WILLIAMS, J. * * * A provision in the third section of the Act of June 2, 1887, relating to the jurisdiction of the courts over gas and water companies is supplemental to the Act of 1874, and defines somewhat more distinctly the duty of such companies to furnish the public with pure gas and water, but it contains no allusion to the subject of price. The power of the court to interfere between the seller and the buyer of water is conferred only by the provisions already quoted from the Act of 1874: and that act authorizes the court to entertain the complaint of the buyer, to investigate the reasonableness of the price charged, and to "dismiss the complaint," or to order that the charges complained of, if found to be unreasonable and unjust, "shall be decreased." The water company prepares its schedule of prices in the first instance, and makes its own terms with its customers; but if these are oppressive, so that in the exercise of the visitorial power of the State the just protection of the citizen requires that they be reduced, then the court is authorized to say, "This charge is oppressive. You must decrease it. You are entitled to charge a price that will yield a fair compensation to you, but you must not be extortionate." This is not an authority to manage the affairs of the company, but to restrain illegal and oppressive conduct on its part in its dealings with the public. It may be that the power to order that any particular item of charge shall "be decreased" includes the power to fix the extent of the reduction that must be made, or to name the maximum charge for the particular service in controversy, which the court will approve, but the decree is that the item shall "be decreased" either generally or to a sum named. The schedule of charges must be

[1] Allnutt v. Inglis (1810) supra.

revised accordingly by the company defendant, and such revision may be compelled in the same manner that the decree of the same court may be enforced in other cases.

We do not think this supervisory power would justify the court in preparing a tariff of water rents and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property, and the business of a solvent corporation, from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The Act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizen from extortionate charges specifically pointed out and complained of by petition. This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable, and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable. In determining the amount of the investment by the stockholders it can make no difference that money earned by the corporation, and in a position to be distributed by a dividend among its stockholders, was used to pay for improvements and stock issued in lieu of cash to the stockholders. It is not necessary that the money should first be paid to the stockholder and then returned by him in payment for new stock issued to him. The net earnings, in equity, belonged to him, and stock issued to him in lieu of the money so used that belonged to him was issued for value, and represents an actual investment by the holder. If the company makes an increase of stock that is fictitious, and represents no value added to the property of the corporation, such stock is rather in the nature of additional income than of additional investment. This whole subject was

brought to the attention of the learned judge by a request that he should find as a matter of law that the reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. This the learned judge refused to find, saying in reply to the request, "we have no authority for such a ruling, and it would be unjust to the consumer who would have to pay full cost of the water, provide a sinking fund, secure a reasonable profit upon the investment, and have no voice in the management of the business of the company. The act of assembly in this regard can bear no such construction."

This ruling cannot be sustained. The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just. Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be the very least at which the water could be afforded in the other. The law was correctly stated in the defendant's request, and the court was in error in refusing it. But we think the court had no power to adopt for, and enjoin upon, the company a comprehensive schedule like that incorporated into the decree in this case. The decree found that the water supply furnished by the defendant company was abundant and "reasonably pure and fit for public use," but, without any adjudication that any particular charge or charges complained of were excessive and must be decreased, he made a decree that "the water rates of the defendant company from March 1, 1896, to be charged and collected from the plaintiffs for water by the defendant company to the plaintiffs shall be as follows:" Then follows a table filling two and a half pages of the appellant's paper-book, and providing specifically for domestic rates, for livery, hotel, and trading stables, for hotels and boarding houses, for fountains, steam engines, schools, motors, public buildings, special rates and meter rates, subject to provision that "when

the water" which the same decree had just pronounced to be reasonably pure and suitable for domestic use "is properly filtered the charges may be increased twenty per cent." The school district of Butler was not a party complainant in this case, nor was the county of Butler, but both were taken under the protection of the court and specifically provided for by the decree. Fountains are luxuries. The question whether the police power of the State can be successfully invoked to cheapen the price of water furnished for purposes of display or the mere gratification of one's taste, is at least open to discussion, but, without discussion, it is disposed of by this decree, and the price reduced. In short, upon a general complaint that the rates charged by the defendant were too high, without specification of the particular charges that were alleged to be excessive, the court has undertaken to revise the entire schedule of prices, and instead of directing the company to decrease the objectionable charges, has formulated an entirely new schedule of prices, covering all of the business of the company. This new schedule it has framed upon the mistaken basis adopted and stated in the third conclusion of law already considered. This action is not authorized by the Act of 1874. It is not the hearing of a complaint against the charges made by the company and a decision of the controversy so arising, but it is the assumption of a power to frame a schedule of prices covering the entire business of the company, with all its customers, many of whom are not even complaining of the rates paid by them. The framing of such a general schedule is ordinarily the right of the company. The correction of this schedule when framed, whenever it may work injustice and hardship, is the prerogative of the court, and one which should be fearlessly exercised.

For reasons now given this decree cannot be affirmed, but under the peculiar circumstances surrounding this case we cannot enter a simple decree of reversal.

GLOUCESTER WATER SUPPLY CO. v. GLOUCESTER, 179 Mass. 365.

(1901)

Petition to determine the value of the petitioner's water plant purchased by the respondent on September 24, 1895, under St. 1895, c. 451 § 16, filed October 29, 1895.

Commissioners were appointed under the provisions of the act, who reported that the value of the plant, exclusive of any allowance for the franchise and rights other than the water rights of the company, and excluding all evidence as to the past earning capacity of the company, was $600,500, and that the petitioner should recover that amount with interest from September 24, 1895, less the sum of $3,955.40, which it was agreed should be deducted therefrom.

LORING, J. * * * It will be convenient to consider the respondent's contention that the commissioners had no right to award the $75,000 allowed by them in addition to the cost of duplication of the water company's plant, less depreciation, in connection with the water company's contention that evidence of past earnings of the water company should have been admitted in evidence.

The act under which the award was made (St. 1895, c. 451) is an act enabling the city of Gloucester to "supply itself and its inhabitants with water." By § 16 of that act, that right is made conditional on its, the city's, purchasing the property of the water company in case the water company elects to sell its property to the city. In case the city agrees to buy the water company's property, under an offer of the water company made under the provisions of that section, it is provided that "said city shall pay to said company the fair value thereof. * * * Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company."

In determining the true construction of these provisions of § 16, it is important to bear in mind the purpose, which the Legislature had, in making the right of the city to supply itself with water conditional on its buying the company's property, in case the company elected to sell it to the city, and in providing that in ascertaining the "fair value" of that property, it should not be enhanced "on account of future earning capacity, or future good will, or on account of the franchise of said company."

On the one hand, it is plain that a private water company organized for net profits cannot hope to compete with a city, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the Legislature had not required the city to buy the water company's property,

the company's property would have been practically, though not legally, confiscated. No doubt, therefore, can arise as to the reasons for the insertion of the clause in § 16 providing that the value shall not be enhanced "on account of the franchise of said company. The franchise of the Gloucester Water Supply Company was not an exclusive franchise. The grant of a similar franchise to the city of Gloucester to supply itself and its inhabitants with water was not a violation of the franchise rights of the Gloucester Water Supply Company; and finally, the sale to the city was not obligatory on the water company. The company was given the option of selling its property to the city or of going on in competition with the city, under the act in question. Under these circumstances, it is plain that the value of the company's property, which the city is compelled to buy, ought not to be enhanced "on account of the franchise of said company."

It is also plain, so long as a water company has no competitor in supplying a town or city with water, it is practically in the enjoyment of an exclusive franchise, although its franchise is not legally an exclusive one. For that reason, the past earnings of this company were not evidence of the "fair value" of this property. The earnings of a company which is in the enjoyment of what is practically an exclusive franchise are not a criterion of the "fair value" of the property apart from an exclusive franchise. We are of opinion that the evidence of past earnings offered by the water company was properly excluded. Newburyport Water Co. v. Newburyport, 168 Mass. 541.

It is argued by the petitioner that the admissibility of such evidence derives support from St. 1891, c. 370, § 12, which provides that in determining the "fair market value" of a gas or electric plant under similar circumstances "the earning capacity of such plant based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant" is to be included "as an element of value;" but this clause as to the earning capacity being considered as an element of value was omitted from the act in question.

The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less depreciation, of the water company's plant is whether the principles on which the

commissioners proceeded were sufficiently favorable to the water company.

It is plain that the real, commercial, market value of the property of the water company is, or may be, in fact, greater than "the cost of duplication, less depreciation, of the different features of the physical plant." Take, for example, a manufacturing plant: Suppose a manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern; it will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business. National Waterworks Co. v. Kansas City, 62 Fed. Rep. 853.

We think it is plain that there is nothing in the provisions of § 16 of the act in question, St. 1895, c. 451, forbidding the commissioners considering this element of value which, as we have seen, in fact exists. The provisions of the act are that the "fair value * * * shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company." Whether that would allow present earning capacity and present good will, apart from the franchise, to be taken into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value, which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute.

It is also plain that the commissioners, in allowing the $75,000 allowed by them in addition to the cost of duplication, less depreciation, of the plant in its physical features, did not go beyond this. They state that in their opinion "the cost of duplication, less depreciation, of the different features of the physical plant, * * * does not represent a fair valuation of this plant, welded together, not only fit and prepared to do business, but having brought that business into such a condition that there is an enhanced value created thereby, so that the city in purchasing it, without considering its income or right to do business, but having the power to carry it on its own account, should pay more for the property as such than as if this consideration did not obtain. This is a value that we have found to me seventy-five thousand

dollars ($75,000) that has been imported into the plant, which seems to us as much a part of the property valuation as any other part of it."

Report affirmed.

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e. Obligation to Exercise Diligence.

TELEGRAPH CO. v. GRISWOLD, 37 Ohio St. 301.

(1881)

Action for damages for negligence of a telegraph company in transmitting the following telegram:

Woodstock, Ontario, December 23, 1871.

Messrs. Griswold & Dunham.

Will you give one fifty for twenty-five hundred at London? Answer at once, as I have only till night.

S. W. COWPLAND.

This was an inquiry whether the sender would pay $1.50 in gold for 2,500 bushels of flaxseed at London, Ontario. As delivered the dispatch read "five" instead of "fifty." The dispatch was sent under the following agreement:

"Half the usual price will be charged for repeating the message, and while this company in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays, in the transmission or delivery, nor the non-delivery of the repeated messages, beyond two hundred times the sum paid for sending the messages, unless special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid at the time of sending the message, nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery of any unrepeated message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated therein, and paid for at the time."

Judgment for plaintiff.

BOYNTON, C. J. * * * The first question arises on the exception to that portion of the charge by which the jury were told that the special agreement under which the message was sent did not relieve the company from liability for the damages resulting from the inaccurate transmission of the message, if the

mistake or error occurred through the negligence of the company or its agents. There seems to be a want of harmony in the decided cases on the point of the correctness of this instruction, and this no doubt arises, in some measure at least, from the different views taken of the nature of the employment in which telegraph companies are engaged, and to some extent from different views taken of their rights and liabilities by courts who fully agree upon the nature of such employment, but differ as to the extent of the duties and obligations that spring therefrom. In Parks v. Alta California Tel. Co., 13 Cal. 422, 78 Am. D. 589, the obligations of telegraph companies were held to be the same as those of common carriers, and consequently that they were in effect insurers of the safe transmission of a message, unless the transmission was interfered with by the act of God or the public enemies. An early case in England held the same doctrine. McAndrew v. Electric Tel. Co., 33 Eng. L. & Eq. 180. But the weight of authority both English and American is clearly the other way. Ellis v. American Tel. Co., 13 Allen, 226; Leonard v. New York etc. Tel. Co., 41 N. Y. 544, 1 Am. R. 446; Breese v. United States Tel. Co., 48 N. Y. 132, 8 Am. R. 526; New York etc. Tel. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. D. 338; Bartlett v. Western Union Tel. Co., 662 Me. 209, 16 Am. R. 437; Birney v. New York etc. Tel. Co., 18 Md. 341, 86 Am. D. 607; Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. R. 485.

But that telegraph companies exercise a quasi public employment with duties and obligations analogous to those of a common carrier, is a proposition clearly settled. The statute confers upon them power of eminent domain, which no one will contend could be conferred upon them, consistently with the Constitution, if they were engaged in a mere private employment or occupation by which the public interests were not affected.

They are required to receive dispatches from individuals or corporations, including other telegraph companies, and to transmit and deliver the same faithfully and impartially in the order received, except in a few specified cases, where from public considerations certain preferences may be made. S. & S. 155. These provisions, as well as the nature of the employment itself, are entirely inconsistent with the theory that the business of conducting a line of telegraph is a mere private employment

as distinguished from one carried on for the benefit of the public at large. Granting this, it is, however, contended that because the company is not an insurer of the safe transmission of a message and is authorized to make or adopt such regulations and by-laws for the management of the business as it may deem proper (1 S. & S. 298, § 46), it cannot be made liable to the plaintiff below beyond the amount paid for sending the message, in the face of the stipulation against liability for any error in an unrepeated message, notwithstanding such error resulted from the negligence of the company's agents by whom the message was sent over its wires. To this proposition we do not agree. It has long been the settled law of this State, that a common carrier cannot either by special agreement with, or by notice brought home to the shipper, relieve himself from liability for the consequences of his negligence. Davidson v. Graham, 2 Ohio St. 131; Railroad Company v. Curran, 19 id. 1.

In Graham v. Davis, 4 Ohio St. 377, 62 Am. D. 285, a case involving the liability of a common carrier who claimed exemption therefrom by reason of a special contract with the shipper—it was said that "one of the strongest motives for the faithful performance of a public duty is found in the pecuniary responsibility which the carrier incurs for its failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract therefore with one to relieve him from any part of this responsibility reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral because it diminishes the motive for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have."

These considerations—there referred to common carriers—apply with equal force to those who furnish the means of telegraphic communication to the public. Their employment is not only public in its nature, but it has become a necessity alike to the social and commercial world.

Hence, it is as true of them, as of common carriers, that any stipulation or regulation that authorizes or enables them to secure exemption from liability for negligence, in the transmission or delivery of the message, reaches far beyond the person with whom they are dealing, and for whom the immediate service is

being performed, and affects the entire public. The cases which hold that a common carrier may stipulate for immunity from liability for mere negligence, all agree that they are liable for "gross negligence." But just what this term means is not easily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong. Jones on Bailm. 8—46 et seq. But a majority of the cases would seem to hold it to be a failure to exercise ordinary care. In Wilson v. Brett, 11 M. & W. 113, it was said by Baron Rolfe, that he "could see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet." In Hinton v. Dibbin, 2 Ad. & El. (N. S.) 646, Lord Denman remarked, that "when we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists." See also Beal v. South Devon Ry. Co., 3 H. & C. 337; Austin v. Manchester Ry. Co., 11 Eng. L. & Eq. 513; and comments of PARKE, B., in Wyld v. Pickford, 8 M. & W. 443. In Duff v. Budd, 3 Brod. & Bing. 177, it was held by DALLAS, C. J., that "gross negligence is where the defendant or his servants have not taken the same care of the property as a prudent man would take of his own. And by BEST, J., in Batson v. Donovan, 4 B. & Ald. 21, that "they must take as much care of it as a prudent man does of his own property."

In Grill v. General Iron Screw Collier Company, L. R., I. C. P. 600, gross negligence was held to be a relative term and meant "the absence of the care that was requisite under the circumstances." It was the absence of such care as it was the duty of the defendant to use in the circumstances of the case.

In Beal v. South Devon Ry. Co., supra, it was held in the case of a carrier that "gross negligence includes the want of that reasonable care, skill and expedition which may properly be expected of him." CROMPTON, J., remarking, that "for all practical purposes, the rule may be stated to be that failure to exercise reasonable care, skill and diligence, is gross negligence." To

the same effect is Briggs v. Taylor, 28 Vt. 181, and Shearm. & Redf. on Neg., § 16; all substantially agreeing with WILLES, J., in Lord v. Midland Railway Co., L. R., 2 C. P. 344, that "any negligence is gross in one who undertakes a duty and fails to perform it." See also, Griffith v. Zipperwick, 28 Ohio St. 388; and Pennsylvania Co. v. Miller, 35 id. 549, 35 Am. Rep. 620.

These authorities show a strong tendency in the adjudications to break down the impracticable distinction between what is termed gross negligence, and ordinary negligence, which some of the cases hold to exist. The rule, however, in this State is well settled, that one exercising a public employment is liable for failing to bring to the service he undertakes that degree of skill and care, which a careful and prudent man would under the circumstances employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service, is contrary to public policy, and consequently illegal and void. In our opinion telegraph companies fall within the operation of this rule; and that in failing to exercise such care and skill in the transmission and delivery of messages, they become liable for the resulting consequences, notwithstanding their stipulation to the contrary. The right to make rules and regulations to govern the management of their business is expressly conferred by statute. But such rules must be reasonable, and if they fail to accord with the demands of a sound public policy they are void. Railroad Co. v. Lockwood, 17 Wall. 357; Express Co. v. Caldwell, 21 id. 267.

We are also of the opinion that the failure to transmit and deliver the message in the form or language in which it was received, is prima facie negligence, for which the company is liable: and that to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence. This rule not only rests upon sound reason, but is well sustained by well considered cases. Bartlett v. Western Union Tel. Co., 62 Me. 209, 16 Am. R. 437; Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263, 4 Am. Rep. 673; Tyler etc. v. W. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Baldwin v. U. S. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165; W. U. Tel. Co. v. Carrew, 15 Mich. 525; De La Grange v. S. W. Tel. Co., 25 La. Ann. 383; W. U. Tel. Co. v. Meek, 49

Ind. 53; Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605.

If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability. We are further of the opinion that the court did not err in holding, and so instructing the jury, that the message received by the company for transmission was not obscure within the meaning of the stipulation in the agreement under which the message was sent. It appeared upon its face that it related to a business transaction, a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received. Western Union Tel. Co. v. Wenger, 55 Penn. St. 262; Rittenhouse v. Independent Line of Tel. 44 N. Y. 265, 4 Am. Rep. 673; Manville v. W. U. Tel. Co., 37 Iowa, 220, 18 Am. Rep. 8.

Judgment affirmed.[1]

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3. Rights.

a. To Make Regulations.

WESTERN UNION TEL. CO. v. McGUIRE, 104 Ind. 130. (1885)

Elliott, J. The complaint seeks a recovery of the statutory penalty for a failure to transmit a telegraphic message. The answer of the appellant is substantially as follows: "The de-

[1] Cf., Cases, infra. "Right to make limitations by contract."
Liability for failure to care for patrons.—Richberger v. American Exp. Co., 73 Miss. 161; Dunn v. Western Union Tel. Co., 2 Ga. App. 845; Wyman Public Service Corporations, §§ 980-983.
Liability of gas company for allowing pressure to fall off.—Coy v. Indianapolis Gas Co., 146 Ind. 655. See also Indiana, etc., Gas Co. v. Long, 27 Ind. App. 219; Holly v. Boston Gas Light Co., 8 Gray (Mass) 123.

fendant says that it did fail and refuse to transmit the message set forth in the complaint, but defendant says that the plaintiff was a stranger in Frankfort and a transient person therein; that the said message was one that required an answer; that the defendant has, and had at the time, as one of its general rules and regulations of business, regularly adopted for the government of the operators and agents of said company, the following rule: 'Transient persons sending messages which require answers must deposit an amount sufficient to pay for ten words. In such case the signal, "33" will be sent with the message, signifying that the answer is prepaid,' that the defendant's agent to whom said message was offered, informed the plaintiff of the existence of said rule and what said rule was, and that the amount required to be deposited was twenty-five cents; that thereupon the plaintiff refused to comply with said rule and make said deposit."

To this answer a demurrer was sustained, and on this ruling arises the controlling question in the case.

One of the incidental and inherent powers of all corporations is the right to make by-laws for the regulation of their business. There is no conceivable reason why telegraph corporations should not possess this general power; nor is there any doubt under the authorities that this power resides in them. Western Union Tel. Co., v. Jones, 95 Ind. 228 (48 Am. R. 713), vide opinion, p. 231, and authorities cited; Western Union Tel. Co. v. Buchanan, 35 Ind. 429 (9 Am. R. 744); True v. International Tel. Co., 60 Maine, 9 (11 Am. R. 156); Scott & J. Law of Telegraphs, section 104.

Affirming, as principle and authority require us to do, that the telegraph company had power to make by-laws, the remaining question is whether the one under immediate mention is a reasonable one. It is established by the authorities that an unreasonable by-law is void. Western Union Tel. Co. v. Jones, supra; Western Union Tel. Co. v. Buchanan, supra; Western Union Tel. Co. v. Adams, 87 Ind. 598 (44 Am. R. 776); Western Union Tel. Co. v. Blanchard, 68 Ga. 299 (45 Am. R. 480, see authorities note, pages 491, 492).

It is for the courts to determine whether a by-law is or is not an unreasonable one, and this is the question which now faces us. 1 Dillon Munic. Corp. (3d ed.), section 327; Scott & J. Law of Telegraphs, section 104.

We are unable to perceive anything unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services. It is not unnatural, unreasonable, or oppressive for the telegraph company to take fair measures to secure payment for services rendered, and in requiring a transient person to deposit the amount legally chargeable for an ordinary message, it does no more than take reasonable measures for securing compensation for transmitting the asked and expected message.

We have found no case exactly in point, but we have found many analogous cases which, in principle, sustain the by-law before us. Western Union Tel. Co. v. Carew, 15 Mich. 525; Camp v. Western Union Tel. Co., 1 Met. Ky. 164; Vedder v. Fellows, 20 N. Y. 126; Ellis v. Am. Tel. Co., 13 Allen, 226; McAndrew v. Electric Tel. Co., 33 Eng. L. & Eq. 180; Western Union Tel. Co. v. Blanchard, supra, see authorities cited note, 45 Am. R., page 489; Western Union Tel. Co. v. Jones, supra.

Judgment reversed, with instructions to overrule the demurrer to the answer and to proceed in accordance with this opinion.[1]

OWENSBORO GASLIGHT CO. v. HILDEBRAND.

42 S. W. Rep. (Ky.) 351.

(1897)

HAZELRIGG, J. The Owensboro Gaslight Company and the Owensboro Electric Company are not given, in express terms, exclusive right to manufacture and furnish gas in the city of Owensboro, but the companies are given the use of the streets and public ways of the city for the purpose of laying the mains and pipes and other appliances in the maintenance of its work. The companies may also acquire the use of lands for their busi-

[1] Use of telegraph blanks may be required by telegraph companies.—Wyman, Public Service Corporations. § 412.
Regulation of the service.—Wyman, Public Service Corporations, §§ 860-892.

ness by writs and quod damnum. Their business, therefore, is affected with public interest, and they are quasi-public corporations, and practically they have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city. It is therefore their duty to furnish the city's inhabitants with gas, and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices, or impose different terms and conditions, according to their caprice or whim. They may, however, fix reasonable rules and regulations applicable to all the consumers alike. In these cases the companies undertook to compel the appellee to deposit the sum of twenty dollars as security for his future consumption of gas and electricity, and upon his refusal to do so, withdrew their pipes and wires from his building. This suit by appellee was to compel them to furnish him light, and the court, on final hearing, granted the relief sought. It is conceded by appellee that appellant may prescribe reasonable rules and regulations, and impose reasonable conditions upon the consumer, and require proper security for the payment of their bills, and may even require deposits in advance; but his contention here is that the companies have adopted no such rule or regulations as they have attempted to enforce against him, and such appears to us to be a fact. No rule or regulation of a general character is relied on or exhibited by the companies, and to allow them to select this or that consumer against whom to enforce special rules would put the consumer at the capricious humor of the agents and employees of the companies.

The judgment below is affirmed.[1]

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b. To Make Limitations by Contract.

GRINNELL v. WESTERN UNION TELEGRAPH CO.,

113 Mass. 299.

(1873)

Counts in contract and in tort joined for breach of a contract and for negligence in transmitting to an insurance company a tele-

[1] Gas companies may make regulations requiring application, deposit, regulating the placing of governors and establishing precautions against tapping mains.—Wyman, Public Service Corporations, § 411, § 434, § 826, § 623.

graph message for renewal of insurance, and calling for an answer. The operator omitted the word "answer." Plaintiff thereupon effected new insurance at a cost of $35, and was obliged to pay the first company $35. The message was written on a printed blank requiring repetition of the message and payment of an additional sum if the telegraph company were to insure correct transmission. The court below ruled that the action could not be maintained for more than twenty-five cents, the charge for sending the message.

GRAY, C. J. The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or mesage, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself.

The duty of a telegraph company, as defined in our statutes, is that it "shall receive dispatches from and for other telegraph lines, companies and associations, and from and for any person; and on payment of the usual charges for transmitting dispatches, according to the regulations of the company, shall transmit the same faithfully and impartially." Gen. Stats., c. 64, § 10.

The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages; and, according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the

transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company. Ellis v. American Telegraph Co., 13 Allen, 226; Redpath v. Western Union Telegraph Co., 112 Mass. 71, 17 Am. Rep. 69; Camp v. Western Union Telegraph Co., 1 Metc. (Ky.) 164, 71 Am. D. 461; Western Union Telegraph Co. v. Carew, 15 Mich. 525; United States Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. D. 519; Breese v. United States Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526.

Such a regulation does not undertake wholly to exempt the company from liability for loss, but merely requires the other party to the contract, if he considers the transmision and delivery of the message to be of such importance to him that he proposes to hold the company responsible in damages, for a non-fulfillment of the contract on its part, beyond the amount paid for the message, to increase that payment by one-half. Even a common carrier has a right to inquire as to the quality and value of goods or packages intrusted to him for carriage, and is not liable for goods of unusual value if false answers are made to his inquiries. Phillips v. Earle, 8 Pick. 182; Dunlap v. International Steamboat Co., 98 Mass. 371, 377, 378.

In the leading case in this Commonwealth of Ellis v. American Telegraph Co., the action was brought for an error in transmitting a message, by substituting the words "seventy-five" for "twenty-five;" and there was no evidence of carelessness or negligence, except this error, which was made by some agent of the company in transmission. The defendants requested the judge who presided at the trial to instruct the jury that on these facts they were not liable. But the judge ruled that, notwithstanding the terms and conditions set forth in the printed heading of the message (which were substantially like those in the case at bar), the defendants were bound, in transmitting the message, to make use of ordinary care, attention and skill, and were liable for damages arising from inattention or carelessness

in such transmission, and not produced by any unexpected or unforeseen accident; and that the difference between the message received and that actually delivered was prima facie evidence of the want of ordinary care, attention and skill on the part of the defendants. 13 Allen, 226-228.

Upon exceptions to that ruling, the court held that, in the business of transmitting messages by telegraph, as in the ordinary employments and occupations of life, men were bound to the use of due and reasonable care, and were liable for the consequences of their negligence in the conduct of their business to those sustaining loss or damage thereby; but that this rule did "not operate so as to prevent parties from prescribing reasonable rules and regulations for the management of the business, or establishing special stipulations for the performance of service, which, if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general liability at common law, and to protect them from being held responsible for unusual or peculiar hazards which are incident to particular kinds of business." It was further said: "Of course, a party cannot in such a way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents." "But he may to a certain extent, in the mode above indicated, limit the extent of his liability, or graduate the amount of his compensation, according to the risk which he assumes, as well as by the nature of the service which he renders." 13 Allen, 234. It was held that the regulation in question was reasonable and valid: that "the defendants were entitled to insist on a compliance with that part of their regulations which required that the message should be repeated, and that the extent of the risk should be made known to them, if they were to be held to insure the safe and correct transmission of the message, or, in case of failure, to be responsible for all the damages consequent on delays or errors." And the court declared that it was mainly for these reasons that the instructions to the jury could not be supported. 13 Allen, 235-237.

Although that action was by the receiver of the message, he was treated throughout the case as claiming through the contract, of which he had notice, made with the company by the sender of the message. No allusion was made, in the judgment

of this court, to the nature of the error in the message, or to its effect as evidence of negligence on the part of the company. Nor was it suggested that there was any insufficiency in the proof of negligence; and there was nothing before this court upon which such a point could have been decided; for the question whether the substitution of "seventy" for "twenty" was or was not of itself proof of negligence, depended upon the plainness of the writing of the original message, which could only be ascertained by inspection, and which was a pure question of fact to be determined by the jury or the court below.

As the instructions at the trial of that case did not allow the plaintiff to recover without proof of negligence to the satisfaction of the jury, the judgment of this court, sustaining the exceptions to those instructions, is a direct adjudication that the regulations in question exempted the company from liability for ordinary negligence where the message had not been repeated and the additional charge paid.

We have been led to make the fuller statement of that case, because its scope and effect appear to us to have been misapprehended in Sweatland v. Illinois & Mississippi Telegraph Co., 27 Ia. 433, 1 Am. Rep. 285, which is the only decision, cited at the bar, inconsistent with the law upon the subject as declared by this court.

In Western Union Telegraph Co. v. Buchanan, 35 Ind. 429, 1 Am. Rep. 744, the action was not for damages, but for a penalty imposed by statute, which could not of course be restricted by the contract of the parties; and it was assumed that in the case of a message not repeated in accordance with the rule, the company would not be liable for damages beyond the amount stipulated, except in case of gross negligence. In True v. International Telegraph Co., 60 Me. 9, 11 Am. Rep. 156, the regulation which was held invalid purported wholly to exempt the company, in case of messages sent by night, from any liability beyond the amount received; and the opinion of the majority of the court appears to be founded on a false analogy between telegraph companies and common carriers, and is opposed by a very able dissenting opinion of Chief Justice APPLETON. In Squire v. Western Union Telegraph Co., 98 Mass. 232, 93 Am. D. 157; and in Leonard v. New York, Albany & Buffalo Telegraph Co., 41 N. Y. 544, 1 Am. Rep. 446, there was no

regulation limiting the liability of the corporation against which the action was brought. In New York & Washington Telegraph Co. v. Dryburg, 35 Pa. St. 298, 78 Am. D. 338, the action was by the receiver of a message, who had no notice of the regulation; and was in substance not founded upon contract, but upon a misrepresentation by the company employed to send the message, by which the receiver was misled and injured. See Ellis v. American Telegraph Co., 13 Allen, 226, 238; May v. Western Union Telegraph Co., 112 Mass. 90, 95.

In the case at bar, the form of the dispatch, delivered by the defendant's agent to the plaintiff, and filled up and signed by the latter, constituted the contract between the parties. The plaintiff, having thus expressly agreed that, if he did not order the message to be repeated, the liability of the defendant for mistakes or delays in its transmission or delivery should be limited to the sum paid, and not having ordered it to be repeated and paid the increased rate required in case of repitition, could not charge the defendant for liability, beyond the amount originally paid for the transmission of the message, for a mistake in the transmission, at least without proving willful default or gross negligence on the part of the company.

There was no offer at the trial to show any wanton disregard of duty or gross negligence on the part of the company or its agents. The offer to prove that "there was negligence on the part of the operator," in not sending the whole message received, must be understood to mean want of ordinary care. No question therefore arises whether the company could be charged by reason of gross negligence, as held in United States Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. D. 519, and suggested in Ellis v. American Telegraph Co., 13 Allen, 226, 234.

The offer of the plaintiff to prove that the repeating of the message as received by the operator of the telegraph at Boston, to th operator at New Bedford, by whom it was sent, would not have disclosed the omission in the message, was rightly rejected as immaterial. The report does not show how such evidence could possibly have proved that fact. But the conclusive answer to it is that the plaintiff, having omitted to fulfill the condition, on which alone, by the terms of the express contract between the parties, he could recover for any mistake in transmission more than the amount of his original payment, cannot be permitted to

prove that his own failure to fulfill his contract did not affect the result. The obiter dicta of Chief Justice BIGELOW in Ellis v. American Telegraph Co., 13 Allen, 226, 238—that it would be a question of fact for the jury whether the mistake in the dispatch would have been prevented or corrected by the repetition of the message; and that of course the company would be liable for any negligence causing damage, which would not have been prevented by a compliance with the rules—are somewhat wanting in precision, owing doubtless to the fact that, as he observed, no such question was before the court. They might perhaps apply where the neglect sued for was in a matter not within the terms of the regulations as, for instance, where no attempt at all was made to send the message. Birney v. New York & Washington Tel. Co., 18 Md. 341, 81 Am. D. 607. But that they were not intended to countenance the admission of such evidence as was offered in the present case, upon any point covered by the contract of the parties, is manifest from his statement, only a few lines above, that it might be a sufficient answer to the claim against the company, "that according to the reasonable regulations by which they were governed in the performance of their undertaking toward the plaintiff, and of which he had notice, they have committed no breach of duty for which they can be held liable to him."

The remaining questions may be briefly disposed of. The evidence of usage and understanding was clearly incompetent to vary the terms or effect of the written contract between the parties. The plaintiff's omission to read that contract cannot relieve him from being bound by his signature. Redpath v. Western Union Telegraph Co., 112 Mass. 71, 73, 17 Am. Rep. 69; Western Union Telegraph Co. v. Carew, 15 Mich. 525; Wolf v. Western Union Telegraph Co., 62 Pa. St. 83, 1 Am. R. 387; Breese v. United States Telegraph Co., 48 N. Y. 133, 8 Am. Rep. 526. The subsequent acts and declarations of the defendant's agents, not connected with the transmission of the message, were not competent evidence to charge the defendants. Mac Andrew v. Electric Telegraph Co., 17 C. B. 3; United States Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. D. 519; Sweatland v. Illinois & Mississippi Telegraph Co., 27 Iowa, 433, 1 Am. Rep. 285; Robinson v. Fitchburg & Worcester Railroad Co., 7 Gray, 92.

The result is that according to the ruling at the trial and the terms of the report there must be judgment for the plaintiff for 25 cents.

SHEPARD v. GOLD STOCK AND TELEGRAPH CO.,

38 Hun. (N. Y.) 338.

(1885)

Appeal from an order vacating an injunction restraining the defendant from removing the gold and stock reporting instruments from the rooms of the plaintiff.

DYKMAN, J. The object of this action is to restrain the defendant from removing the gold and stock reporting instruments from the plaintiff's place of business, and a preliminary injunction was obtained which did forbid such removal. That order was vacated at Special Term, and we have an appeal from that order. The appeal is without merit. In the contract by which the plaintiff procured the possession of the instruments, the company reserved the unqualified right to discontinue the reports and remove the instruments without notice when they were used in any way which it considered detrimental to its interests. The injunction prohibited the exercise of the right thus reserved, and was for that reason properly vacated.

The order should be affirmed, with costs and disbursements.

PRATT, J. Defendants are a public corporation under obligation to render their services impartially and without discrimination to all persons who comply with their reasonable rules. Yet the contract entered into by the parties is not to be disregarded, and such reasonable stipulation as it contains will be respected and enforced by the court. The contract provides as follows: "These reports are furnished to subscribers for their private use in their own business, exclusively. It is stipulated that such will not sell or give up the copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule subscription by one party for the benefit of himself and others at their joint expense will not be received." The stipulation is reasonable and not in conflict with the duty owed by defendants to the public. The proof shows that plaintiff habitually caused the quotations, when received upon defend-

ant's instrument, to be transmitted by private wire to Lawrence Gross & Co., at 574 Fifth Avenue.

Plaintiff seeks to justify this breach of the conditions upon which he received the instrument by alleging that he is interested in business with that firm. We think this affords no justification. If plaintiff, by entering into business relations with another firm, could gain a right to repeat the quotations he might, if diligent, absorb a great share of defendant's business. Plaintiff's attempted justification brings out clearly the reasonableness of the clause in the contract to which we have referred. The violation by plaintiff of the stipulation upon which he received the instrument amply sustains the order vacating the injunction.

Order affirmed, with costs.

PRIMROSE v. WESTERN UNION TEL. CO., 154 U. S. 1.

(1894)

GRAY, J. This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line:—

"Read the notice and agreement on back of this blank."

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1st.] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the original office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or

delivery, or for non-delivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d.] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d.] nor in any case for delays arising from unavoidable interuption in the working of its lines, or for errors in cipher or obscure messages."

After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employe of the company is authorized to vary the foregoing."

"[4th.] The company will not be liable or damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is held with the company for transmission."

The condtions or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first, by which the company is not to be liable for mistakes in the transmission or delivery of any message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that part of the third, by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. Express Co. v. Caldwell, 21 Wall. 264, 269, 270; Telegraph Co. v. Texas, 105 U. S. 460, 461.

The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even

to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by injury of the consignor, and the carrier's compensation fixed accordingly: and his liability to damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order of message, which is not to be carried in the form or characters in which it is received, but it is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in Express Co. v. Caldwell, above cited: "Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 442, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the

distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that "Where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrer assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." Hart v. Pennsylvania Railroad, 112 U. S. 331, 343.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants, or otherwise.

In Western Union Tel. Co. v. Hall, 124 U. S. 444, 453, the effect of such a regulation was presented by the certificate of the Circuit Court, but was not passed upon by this court, because it was of opinion that upon the facts of the case the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in McAndrew v. Electric Tel. Co., 17 C. B. 3, and in Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases used need be cited.[1]

The only cases, cited by the plaintiff, in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be Tyler v. Western Union Tel. Co., 60 Illinois, 421, and 74 Illinois, 168; Ayer v. Western Union Tel. Co., 79 Maine, 493; Telegraph Co. v. Griswold, 37 Ohio St. 301; Western Union Tel. Co. v. Crall, 38 Kansas, 679; Western Union Tel. Co. v. Howell, 38 Kansas, 685; and a charge to the jury by Mr. Justice Woods, when circuit judge, as reported in Dorgan v. Telegraph Co., 1 Amer. Law Times (N. S.), 406, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in Tyler v. Western Union Tel Co., above cited.

In that case, the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker, "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The Supreme Court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Illinois, 439.

The proposition upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender is a contract or not, depends on circumstances," and "whether he had knowledge of its terms and consented to its restrictions is for the jury to determine as a question of fact upon evidence aliunde." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccurracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damages occasioned by causes wholly within their own control," but, "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Illinois, 431-433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not; or else to allow to the stipulation no effect whatever, for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court, when the case came before it a second time, as follows; "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held, it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent of the original charges." 74 Illinois, 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any messages whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one under which appellees defended, is a reasonable regulation and amounts to a contract." And again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Illinois, 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back he did not

venture to say that he had not read it; still less, that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message, and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them only, and was in these words: "Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases." * * *

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis; or else in a mistake of the operator at Ellis, in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irrestible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover

more than the sum which he had paid for sending the single message.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages:" and that it is further stipulated that "no employee of the company is authorized to vary the foregoing," which evidently includes this, as well as other restrictions.

It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville, in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message; and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employee of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher message, for that fact that any message is written in cipher must be apparent to every reader.

Judgment affirmed.[1]

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c. Reasonable Compensation.

GOULD v. EDISON EL. I. CO., 60 N. Y. S. (N. Y. Sup. Ct.) 559.

(1899)

BEEKMAN, J. This action is brought for a mandatory injunction requiring the defendant to reconnect the electric light appli-

[1] Limitation of liability by telegraph companies.—Wyman, Public Service Corporations, 1014, 1025.

ances in plaintiff's apartments with the conductors of the defendant, and to resume supplying the plaintiff with electric light. Damages to the extent of $500 are also demanded for the refusal of the defendant to comply with plaintiff's demand for such service. An answer has been interposed, which, among others, contains what is described as a second and separate defence to the amended complaint. To this the plaintiff has demurred for insufficiency. Without undertaking to state in full the allegations it contains, which are somewhat voluminous, it is sufficient to say that the controversy arises upon the reasonableness of one provision which the defendant requires the plaintiff to assent to as a condition of supplying him with the light desired. This provision was embodied in a paper tendered to the plaintiff for signature, described in the answer as "the usual and regular application for lighting service of the form and tenor therefore adopted by the defendant, and required of all its customers." The stipulation in question, quoting from the answer, was that the plaintiff "would use electric current supplied by defendant for lighting his premises for the period of one year from the time at which connection between the defendants mains and his premises should be made, and that he would pay for such electric current used by him during each month on presentation of bill at the rate of one cent per hour for each sixteen candle-power lamp, or the equivalent thereof, as measured by the meter upon the said premises for the purpose of measuring the current supplied under such application, subject to certain discounts therein set forth." It was further provided that "a minimum monthly charge of one dollar and fifty cents ($1.50) should be made by the company for each separate month during which the agreement should be in effect." It is this last provision which the plaintiff resists as unreasonable, and, if his contention in that regard is correct, the defendant had no right to require his assent thereto as a condition of performing the legal duty which rests upon it of supplying light when properly demanded. What that duty is is expressed in article 6, § 65, of the transportation corporations law (chapter 566, Laws 1890), which, among other things, provides that, upon application in writing of the owner or occupant of any building or premises within one hundred feet of the wires of any electric-light corporation, and the payment by him of all money due from him to such corporation, the

latter shall supply electric light as may be required for lighting such building or premises; and that if for the space of ten days after such application, and the deposit, if any be required, of a reasonable sum, which the company is entitled to exact as security for the payment of its compensation, the corporation shall refuse or neglect to supply electric light as required, such corporation shall forfeit and pay to the applicant the sum of $10, and the further sum of $5 for every day thereafter during which such refusal or neglect shall continue. It is provided, however, that no such corporation shall be required to lay wires necessary to comply with such an application where the ground in which the same is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the wire required to be laid, and the expense of laying such portion.

It will be observed that the Legislature has not undertaken to regulate the price at which such light shall be supplied, nor to limit or define what compensation the corporation may exact for the service rendered by it. In that regard it is under no legal restraint, except that its charges must be reasonable and uniform. Whether, in a given case, they are so or not, is a proper subject for inquiry and determination by the court, in view of the quasi public nature of the business, and the duty towards the public imposed by law upon the corporation. Lough v. Outerbridge, 143 N. Y. 271, 277, 38 N. E. 292. The statute recognizes the right to charge for light consumed, the cost and expense of laying wires, and a rental for wire and apparatus (Transportation Corporations Law, art. 6, §§ 66, 68); but it does not assume to say what may or may not be reserved for either, nor does it require the amount charged to be separated into items with respect to its constituent elements. The law does not contemplate that the defendant shall do business at a loss. It is expected that it will, and it is entitled to, make a reasonable profit upon its venture, and the sole question in such a case as this is whether the charge made is unreasonable, considering all that the defendant is required to do to meet each customer's demand. It is stated in the fourth paragraph of the defence demurred to that the current is generated by dynamos driven by steam engines supplied with steam from boilers, all located

in a station building, and, when generated, is transmitted directly to the defendant's underground conductors leading to the premises of the consumer; that each additional lamp connected with defendant's system necessitates an additional investment by it in distributing conductors and local appliances of about $20 in addition to the cost of generating and delivering the electric current; that the number of lamps which the plaintiff secured was eleven, and that the total additional investment thus made necessary in order to comply with his demand for service was at least the sum of $220. How, then, can it be said that a fixed charge, not based upon actual consumption, is of itself improper or unreasonable? The customer does not bind himself to use any particular amount of light, so that the return to the company, based on actual consumption, would rest entirely upon his violation, and it would, therefore, depend upon him whether the service he has required the corporation to be in constant and immediate readiness to render is profitable or unprofitable to the latter. But this constant condition of readiness is a necessary and unavoidable obligation, which must be sustained, in order to meet instantaneously the demand for light, which the consumer is entitled to have at any moment that he wishes it. It thus forms a part of the service to be rendered, and is an item properly to be considered when the reasonableness of the charges exacted by the company is called in question. As we have seen, the latter is not confined by statute to any specific rate, nor has any attempt been made to measure or limit the compensation which such corporations may lawfully charge, as has been done in the case of gas companies, so that they are free to exact a reasonable return for the service required, which includes, as I have said, not only the actual supply of electric light, but the readiness to supply it, coincidently with the customer's desire to have it. The only condition affecting the right is that the compensation must be reasonable, and, what is also incidental to this requirement, that it should be uniform, namely, the same for all customers similarly situated. Undoubtedly, the demand which those desiring to use it are entitled to make for electric light imports an intention on their part to consume it to some extent, and that each lamp ordered is requisite for that purpose. The charge which the defendant makes is based primarily upon actual consumption over which it has no control. One con-

sumer with the same number of lamps will use more than another. In both cases the return to the company may be remunerative, or the use of one may be so inconsiderable as to involve a loss. To meet this contengency the monthly minimum charge of $1.50 is made. But it must be borne in mind that this payment is not in addition to the charge for actual consumption. Where light is consumed which entitles the company to payment, on meter measurement, of a sum per month equal to or in excess of the so-called minimum charge, the customer pays only for the light he has actually had; so that this fixed charge becomes practically operative only where his consumption falls below the extent of use which it measures. I can see nothing unreasonable in this when the service, as I have defined it, which the company is obliged to render, is considered. It is not a penalty for a failure to use defendant's product, but is properly to be regarded as compensatory for that part of the service which is at all times being rendered in the maintenance of the apparatus and connections through which the electric current is made available to the customer for the production of light at his pleasure. The plaintiff distinctly refused to pay any such charge, and the defendant was, therefore, justified in refusing to supply him with light. The duty resting upon the company under the statute imports a reciprocal one on the part of the customer to pay for the service which he requires, and, where the latter refuses in advance to pay charges which appear to be reasonable, the company is under no obligation to render the service demanded. As the defence in question is sufficient upon its face, it follows that the demurrer thereto must be overruled.

The demurrer is therefore overruled, with costs, and judgment ordered in favor of the defendant accordingly.

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4. Termination of Relation.

CENTRAL UNION TEL. CO. v. FALLEY, 118 Ind. 194.

(1888)

Mandamus, to compel appellant to furnish her a telephone at her place of business with telephonic connections and facilities. The Indiana statutes required every telephone company with wires wholly or partly in the state and doing a general telephone

business to furnish telephone service and connection without discrimination to all applicants at a charge not in excess of $3.00 per month. Defendant alleged that it had gone out of the general rental business, offering a public toll service instead.

OLDS, J. * * * In determining this case, it is important to consider the nature of the telephone, how operated, the utility of it, and the rights of the parties in the absence of the statutes enacted by the legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others who are not telegraphists, the telegraph would be useless. It is therefore, only beneficial to the general public when operated by persons or companies keeping in their employ telegraphists to send, receive, and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate it. Webster defines it as "an instrument for conveying sound to a great distance."

In the case of the Central Union Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. R. 721, the word "telephone," as used in the act of April 13, 1885, was held to mean "an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages." By the use of the telephone, persons are enabled to converse with each other while in their respective business houses or residences a great distance apart. Although of recent date, it has become of important use in the transaction of business, and there is no other invention or device to supply its place. While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been

held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. To conduct the business of the telephone by public telephone stations and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified and so arrange their business as to leave and go to another telephone station and hold the conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business, and converse without the loss of valuable time on the the public, independent of the statute, as regards discrimination?

Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities, and service to business houses, persons, and companies, and discriminating against any person or company can be compelled by mandate, on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the case of State v. Nebraska Telephone Co., 17 Neb. 126, 52 Am. R. 404; Vincent v. Chicago, etc. R. R. Co., 49 Ill. 33; People v. Manhattan Gas Light Co., 45 Barb. 136. And the principle held in these cases is in accordance with the well-settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities, and service; and even if it were

controverted, it is well settled by authorities that the legislature has the right to do so, relative to the business conducted within the state: Hockett v. State, 105 Ind. 250, 5 N. E. R. 178, 55 Am. R. 201; Central Union Telephone Co. v. Bradbury, supra, and authorities cited in those cases; Johnson v. State, 113 Ind. 143, 15 N. E. R. 215; Munn v. Illinois, 94 U. S. 113; Ouachita Packet Co. v. Aiken, 121 U. S. 444, 7 St. Ct. R. 907; Patterson v. Kentucky, 97 Id. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent discrimination, and section 1 of the act of April 13th only to fix the price for the rental of telephones when the telegraph company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation, or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telphone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the legislature that where a telephone company was doing a general telephone business in this state, any person within the local limits of its business in a town or city should have the right to demand and receive a telephone and telephonic connections, facilities, and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the state. The legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual and gave him the right to demand and receive such service

within the limits of the company's business, in any town or city where such company is doing a general telephone business.

The judgment is affirmed, with costs.

WESTERN UNION TEL. CO. v. MITCHELL, 91 Tex. 454.

(1898)

Case, certified by court of civil appeals to determine, among other things, whether the trial court ruled correctly in charging in effect that if the telegraph company could not find the addressee the message should have been delivered to his wife. The telegram read: "Water is getting low. Come out," and was sent to inform plaintiff of danger to his cattle from lack of water. It was alleged that if the message had been delivered within a reasonable time he could have gone to his ranch and made arrangements that would have saved him from heavy losses. Plaintiff left home at 10:50 A. M. the day the message was sent, but his wife remained at home in the town all day. On failing to find plaintiff the receiving operator telegraphed the sending operator of the fact and was instructed to deliver the message to a firm of merchants in the town where plaintiff lived.

BROWN, A. J. * * * There was error in giving the special charge mentioned in the third question. The general rule is expressed by Croswell in his work on the law of Electricity, section 412, thus: "The leading principle as to delivery of a telegram is, that the message is to be delivered to the person to whom it is addressed, and the place of address is subordinate to the person, and, therefore, if the person cannot be found at the street and number or other place to which the telegram is addressed, but can be found by reasonable efforts of the telegraph company in some other place, it may be negligence for the company to leave the telegram at the place of address without making further efforts to find the absent person and make personal delivery": Western Union Tel. Co. v. Cooper, 71 Tex. 507; 9 S. W. R. 598, 10 Am. St. R. 772; Western Union Tel. Co. v. Houghton, 82 Tex. 561, 17 S. W. R. 846, 27 Am. St. R. 918; Tel. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. R. 800; Pope v. Telegraphic Co., 9 Mo. App. 283.

If a message be addressed to the care of another, it may be delivered to such person; or, if the addressee has taken rooms

at a hotel, where it is the custom to deliver mail and such messages, it will be presumed that the clerk is the agent of the guest to receive messages of this character, and a delivery to such clerk will be sufficient.

The wife, as such, is not in law the general agent of her husband, and we know of no principle of law that would justify the conclusion that it was the duty of the defendant to deliver the message in this case to Mrs. Mitchell, nor that such a delivery to her would have satisfied the obligation of the telegraph company to Mitchell.

The duty which the telegraph company owes to the addressee is personal, and cannot be discharge by making inquiry for the person to whose care the message may be sent, nor by applying to the place of business or residence of the addressee, but inquiry must be made for the person addressed, if the circumstances are such as to show that he may probably be found away from such place of business or residence. The place to which a message is sent is but a guide for the messenger, and does not determine the measure of his diligence. Whether the messenger who is charged with the delivery of a telegram and fails to present it at the residence or place of business of the addressee has used ordinary diligence such as the law requires is a question of fact for the jury; and it was error for the court in effect to charge the jury as a matter of law that it was a duty of the telegraph company to deliver the message to the plaintiff's wife.

Attorneys for appellee cite the case of Given v. Western Union Tel. Co., 24 Fed. Rep. 119, as supporting the charge of the court above referred to; and upon a careful investigation we have found Western Union Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. R. 989, which we think is more nearly in point. The former case was based upon substantially the following facts: A message was sent to the plaintiff, and the telegraph company inquired at his place of business, ascertaining that he had left the city, and having exhausted all means of delivering the message to him personally, delivered it to his wife and notified the sender of the fact of such delivery. The court held that the telegraph company had used due care and had discharged its duty to the plaintiff, but did not hold that it was the duty of the company to make the delivery to the wife.

In the case of the Western Union Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. R. 989, a message was sent to the plaintiff in the case at the town of his residence. He was a merchant, and his store was a short distance from the telegraph office, where his wife was in charge of the business, and he had a clerk employed also. His residence was also nearby. The party addressed was out of the town, and the telegraph company failed to apply at his place of business or residence for information or for the purpose of delivering his message. The court held as follows: "Being unable to make a personal delivery at that place, it was the duty of the company to deliver it to his wife or to his clerk at the store or to members of his family at his residence. If delivery had been made at either of these places, the agents of Woods would have had time and opportunity to have sent a message to him at Grant Summit, and thus have averted the loss which followed." It will be observed that the court here speaks of the persons to whom the delivery should have been made as the agents of the party addressed, and in so far as they were agents and authorized to receive the message this is a correct expression of the law, but that portion which announces that it was the duty of the telegraph company to deliver to members of the family is purely dictum and without any support whatever.[1]

[1] Withdrawal from public employment.—Wyman, Public Service Corporations, §§ 290-320.

CHAPTER XII.

REMEDIES

1. Bailments.

The following actions were available at the common law, to the bailor against the bailee:—detinue (and replevin), account, case, trover and assumpsit; to the bailor against third persons:—detinue (and replevin), trespass, trover, and case; to the bailee against the bailor:—detinue (and replevin), and trover; to the bailee against third persons:—detinue (and replevin) trespass, case and trover. See chapter 1; also 5 Cyc. 213-4, 216-7.[1]

2. Public Callings.

a. Actions at law.[2]

[1] "The measure of damages in an action of contract by the bailor against the bailee for breach of the obligations of any of the bailments is the difference between the value of the article in its damaged condition and what it would have sold for undamaged at the time and place of delivery, with the value of any other pecuniary injuries contemplated, and legal interest from the termination of the bailment." Willis on Damages, 131.

[2] "The simplest form which the power to regulate the conduct of public service can take is that adopted by the common law, that is, the action of the courts, declaring the conduct of the proprietor improper or inexcusable upon suit of the party who has gained thereby. Such power has been exercised by the courts of the common law from the beginning of their history. It has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum, the courts have jurisdiction to inquire into that matter, and to award the shipper any amount exacted from him in excess of a reasonable rate. This power, which has aptly been called a visitorial power of the state, is only one example of the general power of the state to oversee the acts of those who are engaged in its public service, and to make sure that they really serve the public interests. Thus the power to order the location of stations is within the general jurisdiction of the courts of law." Wyman, Public Service Corp. § 1401.

(1) Damages.

(a) Innkeepers.

An action against an innkeeper for injury to a guest or his goods is in its essence an action for breach of his undertaking at the time he accepted the guest; an undertaking growing out of his consent to receive the guest, but not properly a contract, since the terms of the undertaking are fixed by law, and not by agreement of the parties. An action against an innkeeper for refusal to perform his public duty is still more clearly for breach of an undertaking imposed by law, and not growing out of an agreement by the parties. This kind of action was one well known in earlier times; it was an action on the case upon the Super Se Assumpsit. (2 Ld. Raym. 909. 1703) As Lord Holt said in Coggs v. Bernard explaining the difference between such an action and one for the breach of an executory contract, "assumpsit does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself." Actions on the case induced by an assumpsit included, therefore, both actions for breach of a contract made on good consideration, and actions for breach of a non-contractual undertaking upon performance of which the defendants had entered. * * * In most cases this fact is marked by the singular doctrine that a breach of an undertaking like that of a carrier or innkeeper to a particular person may be redressed by an action sounding in tort or by one sounding in contract, at the plaintiff's option. This option, however, does not extend to the case where the person who has undertaken a public employment refuses to exercise his employment for the benefit of a person having a right to demand it. For such a breach of obligation the remedy is in tort only. * * * For refusal to receive a traveler as a guest, therefore, redress against the innkeeper must be had by the injured party in an action on the case sounding in tort. For injury to the person or property, the action may be either assumpsit for breach of the "implied contract," or, as is more usual, an action on the case. Even for entire destruction or loss of the goods, the innkeeper is not liable in trover, unless an actual conversion is shown. * * * The declaration against the innkeeper need not set out the customary liability of innkeepers, since that is part of the law of the land,

(Kisten v. Hildebrand 9 B. Mon. Ky. 72, 1848.) but it must allege the defendant to be an innkeeper and must state the existence of the relation of host and guest betwen the parties at the time of the injury. (Towson v. Havre de Grace Bank, 6 Har. & J. Md. 47, 14 Am. Dec. 245). Being a public innkeeper, received the horses as such sufficiently alleges the relation (Pett v. McGraw, 25 Wend. N. Y. 653, 1841.) * * * An action against the innkeeper, for the personal injury will not survive against the executors of the innkeeper, since the injury is merely a personal one; (Stanley v. Bircher, 78 Mo. 245, 1883). While an action for injury to the guest's property will survive both against the innkeeper and in favor of the representative of the guest. (Morgan v. Ravey, 6 H. & N. Eng. 265, 1861) * * * An innkeeper may be sued as such for loss of goods only by the guest. If one lends his property to another, and the bailee comes with it to an inn and it is there lost, the guest alone may enforce the innkeeper's peculiar liability. (Robinson v. Waller 1 Rol. Abr. 3, pl. 6, 1617.) (Coykendall v. Eaton, 55 Barb. N. Y. 188, 37 How. Pr. 438, 1869)

If, however, the guest is a member of the owners family the owner may sue; so a father may sue the innkeeper for the loss of his goods taken to an inn by his minor son, or a master for his goods taken to an inn by his servant, or a partner for goods of the firm taken to an inn by another partner. The reason for these decisions is that the legal possession of the goods at the time of the injury is in the father or master, and he is permitted to sue directly for an injury to his possession. The bailee has an independent possession, and the bailor should therefore have no action based on the duty of innkeeper. If the innkeeper committed an active tort, as, for instance, by converting the goods to his own use, the bailor should of course have an action as any owner would have; but this is quite independent of the action based on the liability of the innkeeper. This distinction appears to have been lost sight of by the courts in a few cases. In Maryland, a bailee of money became a guest at an inn and the money was stolen. The owner of the money was allowed to sue the innkeeper for the loss. (Towson v. Havre de Grace Bank, 6 Har. & J. Md., 47; and to the same effect Walker v. Sharpe, 31 Up. Can. Q. B. 340.) Beale, Innkeepers, §§ 281-5.

b. Common Carriers.

DALE v. HALL, 1 Wils. 281.

(1750)

Action upon the case against a shipmaster or keelman who carries goods for hire from port to part; the plaintiff does not declare against him as a common carrier upon the custom of the realm, but the declaration is, that the defendant at the special instance of the plaintiff undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money, that the goods were delivered to the defendant on board his keel, that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage; upon the general issue non assumpsit; this cause came on to be tried before Justice BURNETT, and the plaintiff proved the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and rusted to the value of 24l. this was all the plaintiff's evidence.

For the defendant it was insisted at the trial that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in, that they pumped and did all they could to prevent the goods being damaged, which evidence the judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

It was now moved for a new trial by Mr. Clayton and Mr. Ford for the plaintiff, who insisted that the evidence given for the defendant ought not to have been received.

FOSTER (Justice) reported that BURNETT (Justice) was doubtful whether the evidence given by the defendant was admissible or not, and submits that to the court; but if it was admissible, he is very well satisfied with the verdict.

Sir Thomas Bootle and Sergeant Bootle, for the defendant, insisted that, this declaration not being upon the custom of the realm, but upon a particular contract, and that the breach assigned being, that by the negligence of the defendant the goods

were spoiled, that therefore negligence is the very gist of this action, and the defendant has proved there was no negligence; indeed, if the declaration had been that the defendant promised to keep safely the goods as well as to carry them safely, he must have kept them safely at all events.

LEE, Chief Justice. This is a nice distinction indeed; I am of opinion that the evidence given for the defendant was not admissible; the declaration is, that the defendant undertook for hire to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says, everything is a negligence in a carrier or a hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies; and a promise to carry safely is a promise to keep safely.

WRIGHT, Justice, of the same opinion.

DENISON, Justice. The law is very clear in this case for the plaintiffs, the declaration upon the custom of the realm is the same in effect with the present declaration; in the old forms it is, that the defendant suscepit, etc., which shows that it is ex contractu; in the present case the promise to carry safely need not be proved, the law raises it, the breach is very right that he did not deliver them safely, but so negligently kept them that they were spoiled.

FOSTER of the same opinion; and a new trial was granted.

DAVIS v. JAMES, 5 Burr. 2680.

(1770)

This was an action against a common carrier, for not delivering goods sent by him; and the only question was, "In whose name the action ought to have been brought."

The fact was that Davis and Jordan, the present plaintiffs, were manufacturers of cloth, at Shipton-Mallet. And their declaration charged, that they being possessed of cloth, as of their own proper goods, delivered the same to the defendant, being the common carrier, etc., and requested him to deliver it safely and secured, for them, to one Elizabeth Bowman at the Three Nuns, at White Chapel; which they undertook to do, for a rea-

sonable price payable and paid by the said plaintiffs to the defendants; but the goods were lost, and never delivered. The defendant pleaded "Not guilty;" and the plaintiffs obtained a verdict.

The defendant's counsel (Mr. Sergeant Davy, Mr. Sergeant Burland, and Mr. Hotckins) moved for a new trial; objecting that the action ought to have been brought in the name of the consignee of the goods, and not in the name of the consignors; for that the consignors parted with their property, upon their delivering the goods to the carrier; and that no property remained in them after such delivery. And they cited as to the point of property, the case of Knight v. Hopper, Tr. 8, W. 3, cases tempore, Holt, Ct. J., pa. 8, and the case of Godfrey v. Furzo, 3 Peere Williams, 185, and Lee and others v. Prescott and some other cases.

Mr. Sergeant Glynn and Mr. Mansfield, of counsel for the plaintiffs, answered that the present question does not turn upon the strict property. The carrier has nothing to do with the vesting of the property: it does not lie in his mouth to say that the consignor is not the owner. He is the owner, with respect to the carrier; who has undertaken to him, and was paid by him. He was therefore servant to the consignor, but had no connection at all with the consignee. And many such actions have been brought by the consignor.

Lord MANSFIELD said, there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases; but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought by the persons who agreed with him and were to pay him.

Rule discharged unanimously.

DAWES v. PECK, 8 Term R. 330.

(1799)

This was an action on the case by the consignor of goods against the defendant, a common carrier, for not safely carrying, according to his undertaking in consideration of a certain hire and reward to be therefore paid, two casks of gin from London

to one Thomas Odey at Hillmorton in Warwickshire within the time limited by two excise permits, in consequence of which the casks of gin became forfeited to the Crown and were seized.

Lord KENYON, C. J. I cannot subscribe to one part of the argument urged on behalf of the plaintiff; namely, that the right of property on which this action is founded is to fluctuate according to the choice of the consignor or consignee, and that consequently either of them may, at his pleasure, maintain an action against the carrier for the non-delivery of the goods. In my opinion the legal rights of the parties must be certain, and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration, in whom the legal right was vested; for he is the person who has sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured. The facts are these; a man in Warwickshire gave an order for goods from London, which he directed to be sent by a certain carrier, and the dealer in London delivered them, accordingly, to that carrier to be conveyed to the vendee. Upon this short statement there can be no doubt but that after such a delivery the vendee must stand to the risk. Then here the damnum et injuria are to him and not to the vendor, the plaintiff. I do not find that anything which I have advanced is broken in upon by the two cases which have been relied upon in the argument: the distinction which is there taken I fully adopt. In the one case the action brought by the consignor against the carrier was contained, because the consignor was to be answerable for the price of the carriage; he stood, therefore, in the character of an insurer to the consignee for the safe arrival of the goods. And the subsequent case of Moore v. Wilson proceeded on the same ground. It is not disputed but that the consignee might have maintained the action in this case: then if the consignee had recovered a verdict against the carrier how could such recovery by a stranger have been pleaded in bar to this action? And if it could not, and yet this action could be maintained, the consequence would be that the carrier would be liable to answer in damages to both for the same loss. Therefore common sense and justice as well as strict law are in favor of the objection made against the plaintiff's recovering in this action.

GROSE, J. The plaintiff, who was at one time the owner of these goods, delivered them by the order of Odey to the defendant, a common carrier, for the purpose of having them conveyed to Odey. By such delivery they became the property of Odey; he was liable to be used for the value of them; and it is admitted that he might have maintained an action for any loss or injury happening to them by the default of the defendant. It is true that, while the goods remained in the hands of the carrier, there was a latent right in the plaintiff to stop them in transitu: but that is in its nature an equitable right, though now grown into law; but the legal right was by the delivery to the carrier vested in the consignee, by whose order they were so delivered. But cases have been cited, wherein it was holden that the consignor might maintain the action; on looking into them, however, it appears that they proceeded on the ground of special agreements between the respective consignors and carriers. Now here there was no evidence of any such agreement; and the letter from the plaintiff to Odey excludes the idea of any such agreement, for the former therein insists that the property was vested in the consignee, whom he considered at all events answerable to him for the value. Then, after it appears that the plaintiff had renounced all right and property in the goods at the time, upon what ground can he claim an indemnity for the loss of what belonged to another? I am therefore of opinion that the action against the carrier ought to have been brought by the consignee of the goods, in whom the property was vested by the delivery to the carrier according to his own order.

LAWRENCE, J. Some stress has been laid on the circumstances of the consignor having paid the carrier for booking the goods, as evidence of a special contract between them, in order to bring this case within those which were cited at the bar; but that circumstance would not give a right of action against the carrier to recover damage for the loss of the goods, if it appeared that they were the property of another person. And here it is admitted that the action might have been brought by the consignee in right of his property in them. It is true that in some special cases a man may make himself liable to either of two persons on account of the same interest; but that is not usual; and it is more consonant to the general principle of law to refer all transactions of agents to the principal on whose account they were entered into.

Now here I consider that what was done by the consignor in respect of the booking was as the agent of the consignee, at whose risk the goods were sent. And, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom the goods are directed, and to whom he looks for the price of the carriage upon delivery.

LE BLANC, J. It is admitted that the legal property of the goods was by the delivery to the carrier vested in the consignee, and that he might maintain the action; and upon eaxmination of the cases referred to in support of the consignor's right of action, it appears that they proceeded upon the ground of a special agreement between the parties that the consignor was to pay for the carriage of the goods. But as there was no evidence of any such agreement in this case, I think that the nonsuit was proper.

Rule discharged.

SMITH v. SEWARD, 3 Pa. St. 342.

(1846)

This was an action on the case for the loss of horses, etc., in crossing a ferry. The plaintiff declared against A. Smith, as owner and occupier, and E. Smith being in his employ for conducting said ferry: "for that they, the said defendants, respectively occupying and conducting said ferry, offered and undertook, in consideration that the public, and those desirous of traveling across said river, should be conveyed across by means of the ferriage of said defendants, and for hire to receive and safely to convey across said river, by a certain ferryboat, across, etc.; and also wagons, etc.; and, having thus offered and undertaken, did use, occupy, and conduct said ferry; that plaintiff learning said defendants did so use and occupy, and had offered and undertaken safely to transport, etc.," brought certain horses, and a wagon of the value, etc., together with goods in the care of L. O. to said ferry. That said horses, etc., being on said track, E. Smith, at the instance, and in the employ of A. Smith, did agree safely to receive and convey, and that plaintiff, in consideration of such undertaking, committed said property to the care of said defendants. That defendants contriving, etc., did not safely convey, but through their carelessness said goods, etc., were thrown into the river and lost.

The second count was in substance the same, laying a general undertaking by defendants to convey. The plea was not guilty. The evidence showed, according to the finding of the jury, though there was conflicting testimony whether the negligence of the wagoner was the cause of the accident, that there was no fall-board at the end of the flat used as a ferryboat, and it being insecurely fastened to the shore, the wheels of the wagon striking the side of the boat, as it was being driven on board under the direction of the ferryman, the flat was shoved from the shore, and the horses fell into the river and were drowned, the harness injured, and a whip and robe lost.

One of the witnesses called by plaintiff to prove these facts, before any evidence of negligence was given, was the owner of the goods in the wagon, which were also injured; he had hired the horses of the plaintiff, and a wagoner to haul them; to his deposition an exception was taken.

His Honor (CONYNGHAM, P. J.) instructed the jury that the action being for a tort, viz., negligence of defendants, a recovery could be had against either of the defendants if the evidence justified it, the owner of the ferry being bound to have the boat and fixtures in proper order; but as the only ground was defect in the fastenings, he did not see how a verdict could be found against the hired man. That a ferryman was a common carrier, and was responsible for all losses except those occasioned by the act of God, inevitable accident, or the public enemies. If a fastening was necessary, he was bound to have it, and if it broke he was liable though he thought it sufficient.

To this there was an exception, and the errors assigned were to the admission of the testimony excepted to. 2d. In the construction that a verdict could pass against one defendant. 4th. The charge as to the extent of the liability. The 3d was for not arresting the judgment. The reasons in support of the motion were, 1. The declaration counded in contract, and there being a verdict in favor of one defendant, no judgment could be entered. 2. That no sufficient consideration was alleged.

Butler and Wright, for plaintiffs in error. The declaration is in assumpsit, and the undertaking and agreement of the defendant are alleged as the gravamen of the action; hence, of course, both or neither defendants are liable. That this is so, is

shown from the fact that no single requisite to a declaration in contract is wanting. * * *

Dana, contra. The occupation of defendant implied a general undertaking and obligation to keep suitable boats and fastenings, the failure in which is a tort or violation of his duty, by reason that it is a breach of his undertaking; and it was long doubted whether a verdict could pass for one only in a suit against carriers. Here the misfeasance was distinctly put in issue and canvassed in the court below; and there must be a clear violation of some rule of pleading to reverse a judgment under such circumstances. All actions against carriers are directly on the contract or for a tort founded in fact on, or deducible from a contract, for wanton injuries rarely occur; a declaration must therefore be tinctured with contract. Church v. Munford, 11 Johns, 479; Zell v. Arnold, 2 Penna. Rep. 292. But the plea cures all defects, provided there be a tort averred in the declaration; Bac. Abr. 3, Pleas G. 2; and the averment of a consideration became immaterial.

2. The evidence does not show that he was such a bailee as to be liable in the manner now contended for, and if he was, that is waived by this action.

GIBSON, C. J. * * *

The motion to arrest the judgment for the reason that the verdict was against but one of the defendants, was properly dismissed, the declaration being for a tort, which is both joint and several. It was originally the practice to declare against a carrier only on the custom of the realm; but it has long been established that the plaintiff may declare in case or assumpsit at his election; and it is usual to declare in the latter, as was done in McCahan v. Hurst, 7 Watts, 175, Todd v. Figley, id. 524, and Hunt v. Wynn, 6 Watts, 47. Indeed, his right to do so seems never to have been questioned by the English courts. On the contrary, the judges in Powell v. Layton, 2 N. R. 356, and Dale v. Hall, 1 Wils. 282, thought that the declaration is essentially founded in contract, though the word assumpsit be not in it. In Powell v. Layton, the defendant was allowed to plead the non-joinder of his partner in abatement, though the word duty stood in place of the word promise; in which the court seems to have gone very far, inasmuch as the plaintiff may certainly waive the contract and go for tort. There has been a good deal of wavering on the

subject, not only as to the proper remedy, but as to the distinctive feature of the declaration. In regard to the latter, Corbett v. Packington, 6 Barn. & Cres. 268, has put the law of the subject on satisfactory ground, by making the presence or absence of an averment, not of promise only, but of consideration also, the criterion; for it is impossible to conceive of a promise without consideration, any more than a consideration without promise, as an available cause of action; and when a consideration is not laid, the word agreed, or undertook, or even the more formal word, promised, must be treated as no more than inducement to the duty imposed by the common law. Now no consideration is laid in the count before us. The undertaking of the defendants to safely pass the team, is stated to be the consideration which moved the wagoner to commit it to their care; but no consideration is stated for anything else: certainly, none for the defendant's undertaking. As the declaration, therefore, is decisively in case, the verdict against one of the defendants and for the other is consequently good.

Judgment affirmed.

KRULDER v. ELLISON, 47 N. Y. 36.

(1871)

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action is brought to recover the value of a barrel of spirits shellac delivered to defendants, who were common carriers upon the canal, consigned to Newell & Turpin of Rochester, and alleged to have been lost by the defendants.

Upon the shipment, plaintiff sent a bill of sale to the consignees. When the barrel arrived at Rochester it was empty, and was reshipped to the plaintiff and received by him. Defendants' counsel asked the court to charge, that if plaintiff sold the barrel of varnish to Newell & Turpin to be delivered to them upon defendants' boat, upon such delivery the title passed to Newell & Turpin, and the plaintiff could not recover. The court declined so to charge, and defendants excepted.

PECKHAM, J. Had the plaintiff, the vendor of the goods, the right to maintain an action for their loss? Here the evidence shows that Newell & Turpin, of Rochester, had ordered the goods from plaintiff, of New York City, to be sent to them "via canal, such as you sent last." Plaintiff sent them a bill by mail of the purchase, and shipped the goods "via canal," by defendant's boat. Plaintiff also remitted to the purchasers a bill of sale of the goods.

The presumption of law is, that the consignee is the owner of the goods in the absence of any evidence on the subject, and is the proper party to sue, for their injury or loss. Sweet v. Barney, 23 N. Y. 335 [318]; Price v. Powell, 3 Comst. 322; Everett v. Saltus, 15 Wend. 474; Ang. on Carriers, § 497, and cases cited.

There have been decisions qualifying this rule as to the proper party to sue, some holding that an action might be maintained by the consignor where he had made a special contract for the transportation.

In Moore v. Wilson, 1 Tr. R. 659, an action was sustained by the consignor against a carrier, where it appeared that the consignee had agreed with the plaintiff to pay for the transportation, Buller, J., holding that the agreement was between the "consignor and the carrier, the former of whom was, by law, liable." One case only is referred to; this was in 1787, in a note, 1 Atk. 248, where the Lord Chancellor declares the rule to be the other way; and that such an action would not lie.

In Joseph v. Knox, 3 Camp. 320, where goods had been shipped by plaintiff, an agent of the owner, who resided abroad, to be forwarded to a given place, and the freight paid by the agent and consignor, a recovery was allowed by Lord Ellenborough, at nisi prius, on the ground of the special contract. This in 1812. So in Davis v. James, 5 Burr. 2680 [381], a like rule was held where the consignor agreed to pay, and paid the carrier in 1770. In Dawes v. Peck, 8 Durn. & E. 330 [382], it was unanimously held, after full citation of authorities and consideration, that an action by the consignor would not lie for the loss of the goods, when they had been delivered to a particular carrier by order of the consignee, though he paid for booking the goods. Lord Kenyon, Ch. J., in delivering the opinion of the court, observed (K. B.): "This question must be governed by the consideration in

whom the legal right was vested, for he is the person who has sustained the loss." The court held, that this booking was done as the agent of the consignee. This in 1799. In Brower v. Hodgson, 2 Camp. 36, a like decision at nisi prius, by Lord Ellen- of the consignee, as appeared by the bill of lading. So held, on borough, where the goods were shipped by order, and on account the ground that the property was in the consignee, from the time of delivery, on board the vessel. This in 1809.

In Dutton v. Solomonson, 3 Bos. & Pul. 582, same doctrine. Lord Alvanley, Ch. J., expressed his surprise that the point should be questioned, as he said it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he names no particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser. The whole property immediately vests in him; and he alone can bring an action for any injury done to them.

In 1803, in Freeman v. Birch, 1 Nev. & Man. 420, a laundress sent linen she had washed to the owner in London, and paid the carriage. Lost by the carrier, the action by laundress sustained on the ground that she had a special property in the linen; but admitted by both justices, Littledale and Parke, that if there be a complete sale the property is out of the vendor altogether. There the vendor transmits as agent for the vendee.

Excepting cases of special contract, where it has formerly been held that the consignor may bring the action, I think the cases agree substantialy that the action must be brought in the name of the consignee only, as the owner; and that the owner alone can bring the action. Angell on Carriers, § 497. In such case, he and not the consignor must bring the action, for the consignor has his remedy against the purchaser. Id. Where the contract of purchase and sale is not valid or complete by reason of the Statute of Frauds, the goods being over the value of £10, and the title, therefore, still vests in the consignor, though the goods have been delivered to the carrier, no acceptance, and all still vesting in parol, the action must be brought by the consignor. Coombs v. The Br. and Ex. R. Co., 3 Hurl. & Nor. 510. But all the judges, in delivering opinions, admitted the rule to be, that the consignee must have brought the action had the order been in

writing, and the sale valid. The question was whether the property passed to the vendee. If it did, he must sue.

In 1858, see Potter v. Lansing, 1 J. R. 215. That the property passed to the consignee, in the case at bar on its delivery to the carrier "via the canal," is entirely clear. People v. Haynes, 14 Wend. 546; Ang. on Car. § 497; Smith's Merc. Law, 290, 5th ed., 2 Kent's Com. 8th ed., p. in mar., 499, and cases cited. There is nothing disclosed in the case to qualify or modify that title. In the language of the books, it is a complete sale. No special contract by the vendor with the carrier, and no payment of the price of transportation of either could effect the title of the vendee. I think it clearly could not. The order being positive and in writing, and stating the mode of conveyance, where the goods were delivered to the carrier pursuant to that order, the title passed absolutely to the vendee, subject to the right of stoppage in transitu, and it gave no right of action to the vendor to sue for the loss of the vendee's goods, though the vendor, as agent for vendee, paid the carriage, or in like character, specially contracted with the carrier to transport. Had the consignor agreed with the consignees to deliver the goods to them at Rochester, the rule would be different. Then the consignees would not be the owners till delivery at Rochester. But upon what principle a vendor can sue for the loss of another's goods, it is difficult to see.

In this case the right of action being in the vendee under the facts disclosed, the return of the empty barrel to the vendor, and his sending on another in no manner affected that right, either by extinguishing or by assigning it to the consignor.

Judgment should be reversed, and a new trial ordered, costs to abide event.

[1] "The measure of damages for refusal by a carrier to receive and carry goods offered for shipment is the difference between the value of the same at the place of shipment and at the destination, less the expense of shipment; the measure of damages for failure to deliver goods is the value of the goods at the time and place of delivery; the measure of damages for unreasonable delay in transportation is the difference in the value of the goods at the time delivered and when they should have been delivered.—with the value in each case of any profits lost and other pecuniary injuries that are within the contemplation of the parties, and legal interest." Willis on Damages, 135.

Init'al carrier liable.—U. S. Comp. St. Supp. 1909, p. 1166; Dodge v. Chicago, etc., R. Co., 111 Minn. 123.

c. Other Public Callings.

MENTZER v. WESTERN UNION TELEGRAPH CO.,

93 Ia. 752.

(1895)

Action for damages caused by delay in delivering a telegram. Judgment for plaintiff.

DEEMER, J. There was testimony tending to show, and the jury may well have found that on the eleventh day of April, 1892, one H. Dorn delivered to defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message:

"Creston, Ohio, 11, 1892.

To J. D. Mentzer, Cedar Rapids, Iowa:

Mother dead. Funeral Wednesday. Answer if coming or not.

H. Dorn."

That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employee in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 A. M., April 11, 1892, but through the negligence and carelessness of defendant's employees, was not delivered until 9 P. M., April 13th. The plaintiff inquired at defendant's office at Cedar Rapids at about 7 o'clock in the evening of April 11th, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11, 1892, and was buried on the 13th, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral.

It is first insisted by appellant's counsel that the plaintiff cannot recover because he made no contract with the defendant, and is not in privity with it; that the action is founded on contract, and therefore he cannot maintain the suit. Such, no doubt, is the rule in England. But the courts of this country almost universally hold to the contrary. In the recent case of Herron v. Telegraph Co., 90 Iowa, 129, we had occasion to consider this question; and the holding there, which is in accord with the current of judicial opinion in this country, was that the person to

whom the message was addressed might maintain an action for the damages sustained by him. * * *

BEAULIEU v. GREAT NORTHERN RY. CO., 103 Minn. 47; 114 N. W. R. 353.

(1907)

Action by Jennie D. Beaulieu against the Great Northern Railway Company. From an order overruling defendant's demurrer to the complaint, it appeals. Affirmed.

BROWN, J. Defendant interposed a general demurrer to the complaint in this action, and appealed from an order overruling the same.

The complaint alleges, in substance, that plaintiff's child, aged three and one-half years, died at Cass Lake, and plaintiff desired that the body should be buried at Ogahmah. The body was accordingly prepared for burial, and delivered to defendant for shipment to that place. The shipment required a transfer of the casket containing the body at Erskine, where the defendant's road connects with the Soo Line, over which the plaintiff and the corpse were to reach Ogahmah. The complaint further alleges that it was the duty of defendant to put the corpse off its train at said Erskine, to the end that it might be transferred to the Soo train. But that, instead of doing so, its servants and agents wrongfully and unlawfully retain possession thereof, and "negligently, wrongfully, and unlawfully, and with utter disregard of the rights and feelings of plaintiff," carried the corpse beyond that station, and to the city of Crookston, thus delaying the funeral arrangements for 24 hours; that, by reason of this delay, the corpse became badly "decayed, mutilated, and damaged." As to the nature and character of the injury and damage to plaintiff, it alleges: "That said funeral was to take place at White Earth on the 21st day of July, 1905, at 3 o'clock p. m. as stated, and at said time and place the plaintiff had her priest and mourners in attendance, but, by reason of the premises, said funeral and burial could not take place at said time, causing this plaintiff great annoyance nd damage. That, by reason of the said neglect, wrongful, and unlawful acts of said defendant, this plaintiff has been greatly damaged, and has been greatly out-

raged in her feelings, and has suffered great distress of mind and great mental pain and anguish, and has become sick and nervous, and will continue to suffer great mental pain and anguish in the future, all to the plaintiff's damage in the sum of $3,000." The complaint charges no willful or intentional misconduct on defendant's part, or on the part of its agents, no claim is made for actual damages, and the allegations thereof, taken as a whole, show only a failure to transport the corpse of plaintiff's child to Erskine, leaving it there for reshipment over the other line to the place of destination, in accordance with its contract. The principal question for consideration, therefore, is whether on the facts stated a recovery may be had for the mental suffering endured by plaintiff in consequence of defendant's neglect.

The question whether mental anguish is a proper element of damage, either in actions in tort or for a breach of contract, has been presented to the courts in numerous cases, and there is much conflict of opinion upon the subject. According to the weight of authority, such damages may be recovered in all actions in tort where the plaintiff has suffered physical injury at the hands of the defendant, whether from malice or mere negligence. (6 Current Law, 631, 8 Am. & Eng. Ency. Law, 658); also in that class of torts where the plaintiff is subjected to some indignity, as in libel, slander, malicious prosecution, or seduction (8 Am. & Eng. Ency. Law, 668; 13 Cyc. 44); and, again, in those willful wrongs where some legal right has been invaded, though no physical injury is inflicted or character or reputation assailed (Lesch v. Railway Co., 97 Minn. 503, 106 N. W. 955; Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Sanderson v. Railway Co., 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509). But such damages are not recoverable in all actions in tort. Broadly stated, their allowance is limited to actions where the plaintiff has received some injury to his person, or some legal right has been invaded of a nature naturally to cause grief and distress of mind. None of the cases, as we read them, go beyond these limits. They are not recoverable in actions for death by the wrongful act of another. Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. 79; Blake v. Railway Co., 18 Q. B. 93; Donaldson v. Railway Co., 18 Iowa, 280, 87 Am. Dec. 391; Munroe v. Pacific Coast, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. Nor in actions for libeling the dead. Bradt v. New

Nonpareil Co., 108 Iowa, 449, 79 N. W. 122, 45 L. R. A. 681, 25 Cyc. 426. Nor in actions for injuries to a minor child. Sperier v. Ott, 116 La. 1087, 41 South. 323, 7 L. R. A. (N. S.) 518, 114 Am. St. Rep. 587, and cases cited in note; Flemington v. Smithers, 2 Car. & P. 292; Bube v. Birmingham Light Co., 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; Black v. Carrolton Railway Co., 10 La. Ann. 33, 63 Am. Dec. 586; Hartford Co. v. Hamilton, 60 Md. 340, 45 Am. Rep. 739; Railway Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44. In State ex rel. v. Railway Co., 24 Md. 84, 87 Am. Dec. 600, an action by a mother for the wrongful death of her son, in which she claimed the right to recover for mental anguish in addition to compensatory damages, the court said: "According to appellant's theory, the mother and son are supposed to live together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are estimable moral examples, beautiful to contemplate; but the law has no standard by which to measure their loss." Loss of support or loss of services is the gist of actions last referred to and compensatory damages only are recoverable, and it is immaterial whether the act complained of was willful and malicious, or merely the result of negligence. There may be other exceptions to the general rule mentioned, as applied to action ex delicto, but we art not concerned with them at this time.

It is also a rule of general application that mental anguish is not a proper element of damage in actions for breach of contract, though there is a class of wrongs arising out of contractual relations in which this element is permitted to enter. Illustrations of this are found in willful and unlawful injuries to passengers upon railroad trains. There is in such cases a contract by the railroad company to carry safely the passenger to his destination, and an implied legal obligation to protect him within certain limits while the relation of passenger and carrier exists, and the courts declare that willful or malicious violation of that duty constitutes an independent tort, for which recovery may be had for the indignity to which the passenger is subjected. Mykleby v. Railway Co., 39 Minn. 54, 38 N. W. 763; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Walsh v. Railway Co., 42 Wis. 23, 24 Am. Rep. 376; Craker v. Railway Co., 36 Wis. 657, 17 Am. Rep. 504. An exception is

also made of actions for breach of promise to marry. But such actions in all essential respects partake of the nature of torts, and are so treated by the courts. Johnson v. Travis, 33 Minn. 331, 22 N. W. 624; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Smith v. Woodfine, 877 E. C. L. 660; Coll v. Wallace, 24 N. J. Law, 291; 5 Cyc. 1021. The rule that damages of this nature may be recovered in an action for a breach of contract properly to send and deliver a telegram has become the settled law in a number of the states following the lead of Texas. But a majority of the courts do not concur in that doctrine. 63 Cont. Law, J. 340; 1 A. & E. Ann. Cases, 355, note. This court declined to follow it in Francis v. Tel. Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507, where the rule laid down in the leading English case of Hadley v. Baxendale, 9 Exch. 341, was approved and followed. But it would be unprofitable to prolong this opinion by an extended discussion of the general subject. Summarizing, it may be said that mental anguish is a proper element of damages in all actions sounding in tort, where the plaintiff has received some physical injury, or his legal rights have been so willfully invaded as naturally to cause mental distress. It is an element to be considered in actions or a breach of contract in exceptional cases only; the principal exception being the telegram cases already referred to. And we pass to a consideration of the question whether this case comes within any of the exceptions.

In respect to the wrongful interference with the rights of preservation and burial of the dead, the courts are again somewhat at variance. Though the common law recognizes no property in the bodies of deceased persons (Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465; Reg. v. Sharpe, 7 Cox. C. C. 214), a right of possession and preservation, for burial purposes is conceded by nearly all the authorities, which the law will protect (Rex v. Fox, 2 Q. B. 246; Williams v. Williams, 20 Ch. Div. 659; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; 3 Am. & Eng. Ann. Cases, 132, note). And any willful or wrongful interference with that right by the intentional mutilation or secretion of the body subjects the wrongdoer to an action on the case, in the determination of which mental anguish is a proper element for consideration in assessing damages. The law on the subject, so far as it relates to actions in torts, is com-

pletely summed up by Mr. Justice Mitchell in Larson v. Chase, supra. It was said in that case: "But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it only has value as an article of traffic. The important fact is that the custodian of it has a legal right to its preservation and burial, and that any interference with that right by mutilation or otherwise disturbing the body is an actionable wrong." That has become one of the leading cases on the subject in this country, and has been cited with approval and followed and applied in other states. Burney v. Children's Hospital, 169 Mass. 58, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273; Koerber v. Patek, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956; Foley v. Phelps (Sup.) 37 N. Y. Supp. 471; Hackett v. Hackett, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762; Louisville v. Wilson, 123 Ga. 62, 51 S. E. 24. The contrary doctrine is upheld by plausible argument in Long v. Railway Co., 15 Okl. 512, 86 Pac. 289, 6 L. R. A. (N. S.) 883, in which the cases holding to the view that no action will lie in such cases, either in tort or for breach of contract, are cited. The rule laid down in the Larson Case expresses the modern view of the question, and extends a remedy where otherwise none would exist. There being no property in dead bodies, and the wrong complained of being only the invasion of an intangible legal right, no actual damages for the wrongful mutilation of the body can be recovered, and the courts award solatium for the bereavement of the next of kin as the only appropriate relief. Without the element of mental distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation. 7 Cur. Law, 9, 54. But that rule can on principle have no application to actions for breach of contract. A breach of contract involves only such consequences as directly result therefrom and were within the contemplation of the parties when the contract was made, and which may be measured and determined by some definite rule or standard of compensation. While the rule of compensation to the injured party controls the measure of damages both in actions ex contractu and ex delicto, the elements proper to be considered are in some respects widely different in the two classes of cases. In actions sounding in tort, exemplary or punitive damages are as

a general rule awarded, in the discretion of the jury. McCarthy v. Niskern, 22 Minn. 90; Peck v. Small, 35 Minn. 465, 29 N. W. 69; 12 Am. & Eng. Ency. Law, 13. But they are compensatory in theory only. Such damages are not recoverable in actions for breach of contract, except, perhaps, in those exceptional cases where the breach amounts to an independent willful tort, in which event they may be recoverable under proper allegations of malice, wantonness, or oppression. 12 Am. & Eng. Ency. Law. 20; North v. Johnson, 58 Minn. 242, 59 N. W. 1012. They cannot be recovered in actions involving ordinary negligence, where no physical injury results. Railway Co. v. Shanks, 94 Ind. 598; Railway Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Gibney v. Lewis, 68 Conn. 392, 36 Atl. 799; Railway Co. v. Arms, 91 U. S. 489, 23 L. Ed., 374; Chicago v. Martin, 49 Ill. 241, 95 Am. Dec. 590. Exemplary damages are incapable of definite ascertainment; and, though classed theoretically as compensatory, they are, in fact, imposed in all the nature of punishment for the wrong complained of, and the amount rests in the sound judgment of the jury. Mental grief from a pecuniary standpoint is just as incapable of definite calculation as exemplary damages. The law furnishes no standard by which it may be valued, the amount awarded in any particular case must necesarily rest in the discretion of the jury, and recovery therefor should on principle be confined to those cases where punitive damages are allowed. In Texas, Kentucky, North Carolina, and perhaps other states, where the so-called "Texas doctrine" in the telegraph cases has met with approval, it is held that in an action for breach of contract concerning the burial of the dead mental anguish may properly be considered by the jury in the assessment of damages to the aggrieved party. Railway Co. v. Hull, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; Hale v. Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 170. Those cases follow logically the Texas rule in the telegraph cases. But, wherever the Texas rule has been repudiated as an innovation upon elementary principles of the common law, the courts have, in our view, consistently reached the opposite conclusion. The cases are collected and the subject discussed in 5 Col. Law Rev. 179, and in 1 A. & E. Ann. Cas. 355. The extreme to which this rule leads is illustrated in two North Caro-

lina cases. A father sent a telegram to a friend at a distant point, stating that his daughter, 16 years of age, was on her way to visit at this home, and requesting the friend to meet her at the train, which arrived about 12 o'clock at night. Through the negligence of the company's agent, the message was not delivered, and no one met the daughter upon her arrival at the station. The conductor of the train placed her in charge of an employé of the railroad company, who procured a carriage, and she was taken to the friend's house, safe and sound, except for her mental anguish and worry. She brought an action for damages against the telegraph company, alleging as ground of recovery her mental distress. The father also sued for mental anguish which he suffered when told the next day of the failure to deliver the telegram. The court sustained the right of action in each case. Green v. Telegraph Co., 136 N. C. 480, 49 S. E. 165, 6 L. R. A. 985, 103 Am. St. Rep. 955; Green v. Telegraph Co., 136 N. C. 506, 49, S. E. 171. These cases are not open to criticism, except to the extent the doctrine upon which they are founded is subject to adverse comment. They follow logically and consistently the "Texas doctrine" and emphasize, in our opinion, the reductio ad absurdum of that rule. Efforts have been made to induce the courts of some jurisdiction to apply that doctrine in various forms for breach of contract. In Eller v. Railway Co., 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225, damages were sought for mental anguish for the breach of a contract to furnish a wedding trousseau, by reason of which plaintiff was subjected to mortification, humiliation, and mental distress. The court rejected the claim. Damages were sought in Railway Co. v. Dalton, 65 Kan. 661, 70 Pac. 645, for negligently carrying plaintiff by the station of his destination, but the court held that distress of mind was not subject of compensation for a breach of contract of that nature. See, also, Wilcox v. Railway Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Railway Co. v. Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913.

But, without further citation of authorities or discussion of the subject from the standpoint of decisions of other courts, we turn to our own decisions, and find that the question has been definitely settled by this court in Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507, wherein we declined to follow the Texas rule. The question

was fully considered in that case, and the conclusion reached that in actions for breach of contract to transmit and deliver a telegram mental anguish occasioned by the breach furnished no proper basis for the recovery of damages. The difference between actions in tort, and those for breach of contract is pointed out with clearness by Mr. Justice Mitchell, who wrote the opinion. The rule therein announced and applied has the sanction of the elementary principles of the law of damages, and is approved by a majority of the courts of this country. In addition to the cases heretofore referred to, we cite Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575. "The law looks," Judge Mitchell remarked, "only to the pecuniary value of a contract, and for its breach awards only pecuniary damages." And the court applied the general rule that in such actions damages must be admitted to the actual pecuniary loss naturally and necessarily flowing from the breach. The logic of that decision applies to the case at bar. The complaint before us charges, at most, a negligent failure to perform the contract, for the breach of which damages for mental anguish are demanded, and the case is not brought within those wherein such damages are awarded for the malicious and wanton breach, to which we have adverted. 13 Cyc. 44-45. Of this class Lindh v. Railway Co., 99 Minn. 408, 109 N. W. 823, 7 L. R. A. (N. S.) 1018, is an example. In that case we did not intend to be understood as holding that mental anguish was a proper element of damages in an action for the failure of a common carrier safely to transport a corpse to its destination in accordance with its contract. The injuries there complained of were treated as a willful tort distinct from the contract, and the conclusion reached is in harmony with Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. If damages for mental anguish may not be recovered in actions wholly in tort, where the parent suffers untold grief at the disfigurement of his minor child, or because of his death by the wrongful act of another, or in actions for libeling the dead, as indicated by the authorities cited, by what course of reasoning, from the view point of legal principles uninfluenced by feelings of sentiment or

resentment, can it be held that they may be recovered, in an action like that at bar, for the mere negligence of a railroad company in carrying a corpse beyond the station of its destination, resulting in no injury to the body, save such as arises from its natural tendency to decomposition? We discover none.

It is urged that damages of this character in actions upon contract, as well as in tort, find support in the declaration of the fundamental law that there there shall be a certain remedy for all wrongs, and that, if they be denied in breach of contract actions, the guaranteed remedy is denied. This is plausible, but not persuasive. The maxim, "ubi jus ibi remedium," has, like other principles of the law, its limitations. The guaranty of a remedy for all wrongs has more particular reference to wrongs of a substantial nature, where property or character is affected, rather than to those founded wholly in sentiment. It protects property and property rights, persons, domestic relations, character, and reputation, but not necessarily grief and mental distress occasioned by some unintentional act of wrongdoing. As remarked by the Supreme Court of Indiana in Telegraph Co. v. Ferguson, 157 Ind. 69, 60 N. E. 674, 1080, 54 L. R. A. 846, the maxim that for every wrong there should be a remedy, as applied to actions for damages for breach of contract, was intended by the "fathers of the common law to include such damages as the courts, dealing practically with the practical affairs of life, can find to be certain and measurable from evidence the source of which is open to both parties, and the nature not transcendental." Other instances where the common law has not afforded a remedy in apparently meritorius cases are numerous, chief among which is the remedy for death by wrongful act first given in England by Lord Campbell's act, and followed by statutory enactments in this country. Without a statute providing a remedy in that class of wrongs, no action could be maintained by the relatives of the deceased for compensatory or other damages. So, in cases like that at bar, the remedy should come from legislation, and not by judicial decisions out of harmony with established principles of the law. Telegraph Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

For these reasons, we conclude that plaintiff is not entitled to recover for her mental anguish. Her complaint, however, charges a breach of contract, and she would be entitled at least to nomi-

nal damages, and the court below properly overruled the demurrer.

Order affirmed.

(2) Injunctions.

"Common carriers and public service corporations in general owe duties to the public. Individuals are entitled to enforce these obligations, in so far as they are themslves concerned; and when the legal remedies are inadequate, equity will grant relief. Common carriers, for example, are under an obligation to serve all persons without discrimination and for a reasonable compensation. Accordingly shippers may enjoin the enforcement against them of unreasonble rates, in order to prevent multiplicity of suits. A mandatory injunction is sometimes awarded to compel a carrier to transport freight or to furnish proper transportation facilities. Unjust and illegal discrimination may be a reason for equitable interferences. Relief may also be had against a violation of duty by general public service corporations, such as gas, water, and telephone companies, when the rights of the individual complainant will be affected thereby."

However, it has been held by the New Jersey courts that an injunction will not lie since mandamus is the proper remedy.

Pomeroy's Equitable Jurisprudence, § 633 and cases cited; 16 Harv. L. Rev. 518; See, also, Chapter VII.

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(3) Mandamus.

STATE EX REL. WOOD v. CONSUMERS GAS TRUST CO., 157 Ind. 345.

(1901)

Mandamus by the State, on relation of Ann E. Wood, against the Consumers Gas Trust Company to compel defendant to permit relatrix to use natural gas from its main. From a judgment for defendant, plaintiff appeals.

Reversed.

HADLEY, J. * * * The things requested and commanded of the appellee were to lay a service-pipe from its main in Bellefontaine Street to the property line in front of the relatrix's house, and to permit her to use the gas. The mandate is not

to furnish the relatrix with an adequate or any definite amount of gas, but the obvious force and limitations of the request, and order, are to require the appellee to furnish her with the necessary means, and permit her to use the gas upon the same terms that other inhabitants of the city are permitted to use it. Is it the legal duty of appellee to do these things? Mandamus is a proper remedy to compel appellee to furnish gas to the relatrix if it is shown that she is entitled to it. Portland, &c. Co. v. State ex rel., 135 Ind. 54, 21 L. R. A. 639.

The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22), and licensed by the city of Indianapolis to lay pipes through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public, in whose behalf the grant is made, and the benefit received by the citizens is the adequate consideration for the right and convenience surrendered by them. The grant thus resting upon a public and reciprocal relation, imposes upon the appellee the legal obligation to serve all members of the public contributing to its asserted right, impartially, and to permit all such to use gas who have made the necessary arrangements to receive it, and apply therefor, and who pay, or offer to pay the price, and abide the reasonable rules and regulations of the company. Portland, &c. Co. v. State ex rel., 135 Ind. 54; Coy v. Indianapolis Gas Co., 146 Ind. 655, 36 L. R. A. 535; Haugan v. Albina, &c. Co., 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424; People v. Manhattan Gas Co, 45 Barb. 136; Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058; American, &c. Co. v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; State ex rel. v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. 574.

But, without controverting the law as declared in the foregoing cases, or claiming exemption from the rule, it is answered as a justification for denying the relatrix the use of gas, that the corporation was organized as a voluntary enterprise in the general interest of the people of Indianapolis; that its purpose was not the making of money for any one, but to furnish gas to consumers in the city at the lowest possible rate, and that the supply

of gas the corporation has on hand, or that it may possibly procure, is insufficient to supply customers it has now connected with its mains, in severely cold weather, and that to permit the relatrix to use gas would be to further reduce the already insufficient supply. Will these facts relieve the appellee of its duty to permit the relatrix to use its gas? If they will, then it must be true that the relatrix is not entitled to share in the gas furnished by appellee to the inhabitants of the city, because her participation will reduce the possible supply below the full requirements of those already being served.

It is proper to observe that the present consumers of appellee's gas are not here complaining of the quantity of gas received by them, or protesting against the admission of the relatrix to a share of the supply, and it is difficult to see how the appellee, while continuing to assert and exercise its extraordinary rights, may set up its own default or probable default to others as a legal excuse for the non-performance of its duty to the relatrix.

The legal effect of the answer is that the relatrix shall have no gas because her neighbors, in common right, have none to spare. It is admitted, because not denied, that the relatrix is a member of that part of the public which appellee has engaged to serve. As such she has borne her part of the public burdens. She has rendered her share of the consideration. Bellefontaine Street in front of her house has been dug up and her property made servient to the use of appellee in laying its pipes, and in carrying forward its business, and her right to use the gas, and to share in the public benefit, thus secured, whatever it may amount to, is equal to the right of any other inhabitant of the city. The right to gas is held in common by all those abutting on the streets in which appellee has laid its pipes, or it is held of right by none. The legislature alone can authorized the doing of the things done by appellee, and this body is prohibited by the fundamental law from granting a sovereign power to be exercised for the benefit of a class, or or the benefit of any part of the public less than the whole residing within its range. Cooley's Con. Lim. (6th ed.), 651, and cases cited.

Appellee's contract is with the State, and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every

citizen similarly situated who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority, or superiority, of the right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So if appellee has found it impossible to procure enough gas fully to supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed to us no special charter privilege, and under the law of its creation, certain it is, that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts, "and no statute has been deemed necessary to and the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are like situated, and not discriminate in favor of, nor against any." 45 Cent. L. J. 278; Haugen v. Albina, &c. Co., 21 Ore. 411; Olmstead v. Proprietors, &c., 47 N. J. L. 311; Stern v. Wilkesbarre Gas Co., 2 Kulp. 499; Chicago, &c. Co. v. People, 56 Ill. 365; 8 Am. Rep. 690; Nebraska Tel. Co. v. State, 55 Neb. 627, 634; Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. 841; State ex rel. v. Delaware, &c. R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543.

In a further material sense the discrimination asserted by the answer becomes injurious to the relatrix. It is a matter of common knowledge that natural gas is a cheap and convenient fuel, and for many reasons is eagerly sought by those who may reasonably obtain it. It is therefore, of like knowledge, that in a community where it is supplied to some premises, and denied to others, the effect is to enhance the value of such parcels as have it, by making it more desirable and profitable to occupy them, and to depreciate the value of such parcels as are excluded from its use. It is very clear that appellee may not, under the guise

of administering a public benefit, exercise a public power, to take the property of one and confer it upon another.

The principal argument of appellee's counsel is, that not having sufficient gas to supply its present customers, and having exhausted every available means for increasing its supply, it is therefore impossible for it to perform its public duty, and mandamus will not lie to compel an attempt to perform a duty impossible of performance. We concede in the fullest terms that mandamus will not lie to require an attempt to do a thing shown to be impossible. But this is not the question we have before us. The relatrix is not asking, nor the court commanding that the company attempt to increase its supply of gas. The relatrix is only seeking to be permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it. There is in the request of the relatrix nothing unreasonable, and nothing impossible of performance. The whole question comes to this. The appellee under public grant for the dispensation of a public good, has taken possession of certain streets and alleys in Indianapolis for the distribution and sale of natural gas to those abutting on its lines. The relatrix owning a lot abutting on one of the appellees lines erected thereon a dwelling-house, and upon the faith of being permitted to use the gas has piped her house, and constructed her heating apparatus of a form, suitable only to the use of natural gas as a fuel, which will be worthless if natural gas is denied her. She has in common with other abutters been subjected to the inconvenience of having the street in front of her house dug up and had her property occupied with the company's pipes. She has made all necessary arrangements to receive the gas, has tendered appellee its usual charges, has offered to abide by its reasonable rules and regulations, and we perceive neither legal reason, nor natural justice, in denying her the rights accorded to those of her neighbors who have contributed in the same way to appellees enterprise. The second paragraph of answer was insufficient, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the second paragraph of the return to the alternative writ of mandate.[1]

[1] 21 Harv. L. Rev. 448; See, also, Chapter VII; Missouri Pacific v. Larabee, 211 U. S. 612.

b. Public (Gov't) Regulation.

SMYTH v. AMES, 169 U. S. 466.

(1898)

Each of these suits was brought July 28, 1893, and involves the constitutionality of an Act of the Legislature of Nebraska, approved by the Governor April 12, 1893, and which took effect August 1, 1893. It was an Act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska and to provide penalties for the violation of this Act." Acts of Nebraska, 1893, c. 24; Compiled Statutes of Nebraska, 1893, c. 72, Art. 12. The act is referred to in the record as House Roll 33.

These cases were heard at the same time, and in the one in which the Union Pacific Company, the St. Joseph Company, the Omaha Company, and the Kansas City Company were defendants, it was adjudged in the Circuit Court—Mr. Justice BREWER presiding—as follows: "That the said railroad companies and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any or either of them for the transportation of freight on and over their respective roads in this State from one point to another therein, whereby such rate shall be reduced to those prescribed by the Act of the Legislature of this State, called in the bill filed therein, 'House Roll 33,' and entitled 'An Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this Act,' approved April 12, 1893, and below those now charged by said companies or either of them or their receivers, or in anywise obeying, observing, or conforming to the provisions, commands, injunctions, and prohibitions of said alleged act; and that the Board of Transportation of said State and the members and secretaries of said Board be in like manner perpetually enjoined and restrained from entertaining, hearing, or determining any complaint to it against said railroad companies or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers,

its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the Legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interestate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonable high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be excepted by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application

higher than in the State of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the Circuit Court: "It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining States, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other States through which the roads run. The question is asked. Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States are of little value, unless all the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are forty per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance." 64 Fed. Rep. 165. In these views we concur, and it is unnecessary to add anything to what was said by the Circuit Court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from

agents, servants, or employees, done, suffered, or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered, or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the attorney-general of this State be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action, or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof directed to the said defendants, commanding, enjoining and restraining them as hereinbefore set forth, which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad companies may not exact for the transportation of freight from one point to another within this State, charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged, and decreed that the defendants, members of the Board of Transportation of said State, may hereafter when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It is further ordered, adjudged, and decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The above decree was in accordance with the prayer for relief. A similar decree was rendered in each of the other cases.

The present appeals were prosecuted by the defndants constituting the State Board of transportation, as well as by the defendants who are Secretaries of that Board.

Mr. Justice HARLAN. * * * It is said by the appellants that the local rates established by the Nebraska statute are much

where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necesary to give just compensation on local business. * * *

In our opinion, the broad proposition advanced by counsel involves misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefits of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. Olcott v. The Supervisors, 16 Wall. 678, 694; Sinking Fund Cases, 99 U. S. 700, 719; Cherokee Nation v. Southern Kansas Railway, 135 U. S. 641, 657. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obliga-

tions, is not alone to be considered when determining the rates that may be reasonably charged. What was said in Covington & Lexington Turnpike Road Co. v. Sandford, 164, U. S. 578, 596, 597, is pertinent to the question under consideration. It was there observed: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the Legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The Legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are unreasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad company corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct

and maintain a public highway simply for its benefit, without regard to the rights of the public. But is is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty it to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the Legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvement, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there

may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

Perceiving no error on the record in the light of the facts presented to the Circuit Court.

The decree in each case must be affirmed.[1]

MINNESOTA RATE CASES, 33 Sup. Ct. Rep. 729.

(Jan. 9, 1913.)

Appeals from the Circuit Court of the United States for the District of Minnesota.

Mr. Justice HUGHES delivered the opinion of the court:

[1] Municipal contracts and rate regulation.—16 Harv. L. Rev. 1-21. Valuation as basis for determining rates.—25 Harv. L. Rev. 173, 195, 379.

U. S. Compiled Statutes, 1901, p. 3154; 1903, p. 361; 1905, p. 596; 1907, p. 876; 1909, p. 1134; 16 Harv. L. Rev. 157-177; 20 Harv. L. Rev. 635; 21 Harv. L. Rev. 175-194; 22 Harv. L. Rev. 250-265.

These suits were brought by stockholders of the Northern Pacific Railway Co., the Great Northern Railway Co., and the Minneapolis & St. Louis Railroad Co., respectively, to restrain the enforcement of two orders of the Railroad and Warehouse Commission of the State of Minnesota and two acts of the legislature of that State prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption or maintenance of these rates by the railroad companies. In addition to the companies, the attorney general of the State, the members of the railroad and warehouse commission, and also, in the cases of the Northern Pacific and Great Northern Cos., certain representative shippers were made defendants.

The orders and acts, by their terms related solely to charges for intrastate transportation. * * *

The complainants assailed the acts and orders upon the grounds (1) that they amounted to an unconstitutional interference with interstate commerce, (2) that they were confiscatory, and (3) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. The jurisdiction of the circuit court was sustained in Ex parte Young (209 U. S., 123), where it was also held that the penal provisions of the acts, operating to preclude a fair opportunity to test their validity, were unconstitutional on their face. The circuit court then referred the suits to a special master, who took the evidence and made an elaborate report sustaining the complainants' contentions. His findings were confirmed by the court, and decrees were entered accordingly, adjudging the acts and orders (with the exception, in the case of the Minneapolis & St. Louis Railroad Co., of the order of May 3, 1907) to be void and permanently enjoining the enforcement of the prescribed rates, freight and passenger, and their adoption or maintenance by the railroad companies. (184 Fed., 765.)

From these decrees the attorney general of the State and the members of the railroad and warehouse commission prosecute these appeals.

The penal provisions being separable (Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 395; Wilcox v. Consolidated Gas Co., 212 U. S., 19, 53, 54; Granada Lumber Co. v. Mississippi, 217 U. S. 433, 443; Western Union Telegraph Co. v. Rich-

mond, 224 U. S., 160, 172), the question of the validity of the acts and orders fixing maximum rates is presented in two distinct aspects—(1) with respect to their effect on interstate commerce, and (2) as to their alleged confiscatory character.

First. As to interference with interstate commerce:

None of the acts and orders prescribes rates for goods or persons moving in interstate commerce. By their terms, they apply solely to commerce that is internal. Despite this obvious purport it has been found below that the inevitable effect of the State's requirements for intrastate transportation was to impose a direct burden upon interstate commerce and to create unjust discrimination between localities in Minnesota and those in adjoining States; and hence that they must fall as repugnant to the commerce clause and to the action of Congress under it. To support its conclusion, the circuit court presents an impressive array of facts drawn from the approved findings of the master. (184 Fed., 775-792.) Without giving all the details they embrace, these findings may be summarized as follows: ***

The foregoing findings, as stated by the master, were made "without regard to the justices or otherwise in fact of the interstate rates so affected by such local rates." The determination of the reasonableness of the interstate rates was not deemed to be within the province of the court.

The appellants do not concede the correctness of the findings in their full scope and insist upon qualifications. They deny that the evidence justified the finding that the companies had maintained "an equable, that is, relatively fair, basis of rates" prior to the acts and orders in question. The general or comprehensive system of interdependent and fairly related rates, each so equitably adjusted to the others that any local change must of necessity throw the whole out of balance, is declared to exist only in imagination—to be a fiction constructed in disregard of the facts of rate making and with out attention to the inconsistencies shown by the schedules which had been in force. The actual reductions in interstate rates, which followed upon the adoption of the State tariffs, were made, it is urged, in rates voluntarily established by the companies themselves which had not been declared to be reasonable by competent authority and and in any case furnish no standard by which the validity of the action of the State, in the control of its internal affairs, should

be judged. The appellants say that the local rates in Minnesota were incongruous and unreasonable; that frequent changes in the interest of favored shippers had been made through the filing of temporary intrastate tariffs until the practice was stopped by a statute of 1905 (ch. 176) forbidding changes without the consent of the commissions; that with respect to grain and live stock, the principal agricultural products of the State, the companies maintained an "inharmonious jumble of arbitrary rates"; and that the acts and orders in question were designed to correct inequalities in the intrastate tariffs and to prescribe charges which, upon thorough investigation and after public hearings in which the companies participated, were found to be reasonable and were brought into suitable relation with each other by means of a scientific plan. And it is denied that unjust discrimination as against localities without the State can be predicated of the establishment of reasonable State rates. * * *

It is conceded, however, that the schedules fixed for intrastate transportation "necessarily disturbed the equilibrium theretofore existing between the rates on the two classes of business" (State and interstate) "on the boundary lines." * * *

The situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involves the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky, and Oregon. * * *

With the appreciation of the gravity of the controversy, the railroad commissioners of eight States[2] have filed their brief as amici curiæ * * *

The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of Federal legislation, rather than from differences with respect to the salient facts.

For the purpose of the present inquiry the rates fixed by the State must be assumed to be reasonable rates so far as intrastate traffic is concerned; that is, they must be taken to be rates which the State, in the exercise of its legislative judgment, could constitutionally fix for intrastate transportation separately considered. If the State rates are not of this character—a question to be dealt with later—they can not be sustained in any event; but assuming them to be otherwise valid, the decree below, with respect to the present branch of the case, rests upon two grounds:

(1) That the action of the State imposes direct burden upon interstate commerce; and (2) that it is in conflict with the provisions of the act to regulate commerce.

These grounds are distinct. If a State enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

Prior to the passage of the act to regulate commerce, carriers fixed their interstate rates free from the actual exertion of Federal control; and under that act, as it stood until the amendment of June 29, 1906, the Interstate Commerce Commission had no power to prescribe interstate rates. (Interstate Commerce Commission v. C., N. O. & P. Ry. Co., 167 U. S., 479, 511.) The States, however, had long exercised the power to establish maximum rates for intrastate transportation. Was this power, apart from Federal action, subject to the limitation that the State could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not be thereby affected? That is, was the State debarred from fixing reasonable rates on traffic, wholly internal, as to all State points so situated that as a practical consequence the carriers would have to reduce the rates they had made to competing points without the State, in order to maintain the volume of their interstate business or to continue the parity of rates or the relation between rates as it had previously existed? Was the State, in prescribing a general tariff of reasonable intrastate rates otherwise within its authority bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the State power, independently of Federal legislation, is thus limited, the inquiry need proceed no further. Otherwise it must be determined

whether Congress has so acted as to create such a restriction upon the State authority theretofore existing.

(1) The general principles governing the exercise of State authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed in the Constitution." (Gibbons v. Ogden, 9 Wheat., 1, 196.) The conviction of its necessity sprang from the disastrous experience under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from State control and to provide effective regulation of that intercourse as the national interest may demand. The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole Government," said Chief Justice Marshall, "seems to be that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." (Id., p. 195.) This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to

regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. (McCulloch v. Maryland, 4 Wheat., 316, 405, 426; The Daniel Ball 10 Wall., 557, 565; Smith v. Alabama, 124 N. S., 465, 473; Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S., 612, 618, 619; Southern Railway Co. v. United States, 222 U. S., 20, 26, 27; Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S., 1, 47, 54, 55.)

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that if regulated at all their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act, and when Congress does act the exercise of its authority overrides all conflicting State legislation. (Cooley v. Board of Wardens, 12 Wheat., 299, 319; Ex parte McNeil, 13 Wall., 236, 240; Welton v. Missouri, 91 U. S., 275, 280; County of Mobile v. Kimball, 102 U. S., 691, 697; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196, 204; Bowman v. Chicago, etc., Railway Co., 125 U. S., 465, 481, 485; Gulf, Colorado & Santa Fe Ry. Co. v. Hefley, 158 U. S., 103, 104; Northern Pacific Ry. Co. v. Washington, 222 U. S., 370, 378; Southern Ry. Co. v. Reid, 222 U. S., 424, 436.)

The principle which determines this classification underlies the doctrine that the States can not, under any guise, impose direct burdens upon interstate commerce; for this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States can not tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. * * *

They have no power to prohibit interstate trade in legitimate articles of commerce * * * or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on; * * * or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection. * * *

But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescense of Congress, have been controlled by State legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supercede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making

reasonable provision for local needs, it can not be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. * * *

Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. (Chicago, Milwaukee, etc., Ry. Co. v. Solan, 169 U. S., 133, 137; Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477, 491; Martin v. Pittsburgh & Lake Erie R. R. Co., 203 U. S., 284, 294; Southern Pacific Co. v. Schuyler, 227 U. S., 601, 613.) Until the enactment by Congress of the act of April 22, 1908 (ch. 149, 35 Stat., 65), the laws of the States determined the liability of interstate carriers by railroad for injuries received by their employees while engaged in interstate commerce and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some States the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. (Mondou v. N. Y., N. H. & H. R. R. Co., supra; Michigan Central R. R. Co. v. Vreeland, 227 U. S., 59, 66, 67.) So, where Congress has not intervened, State statutes providing damages for wrongful death may be enforced not only against land carriers but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the State. (Sherlock v. Alling, 93 U. S., 99, 103. See American Steamboat Co. v. Chase, 16 Wall., 522; The Hamilton, 207 U. S., 398.)

And, until Congress legislated on the matter, liability for loss of property on interstate as well as intrastate shipments was subject to State regulation. Some States allowed an exemption by contract from all or a part of the common law liability; others

allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each State exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of section 20 of the act to regulate commerce. (Act of June 29, 1906, ch. 3591, 34 Stat., 584; Adams Express Co. v. Croninger, 226 U. S., 491, 500.) It is within the competency of a State to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the State law may obstruct the prosecution of a voyage of an interstate character. (The Winnebago, 205 U. S., 354.) It may also create liens for damages to property on land occasioned by negligence of vessels. (Johnson v. Chicago, etc., Elevator Co., 119 U. S., 388; Martin v. West, 222 U. S. 191.) Cars employed in interstate commerce may be seized by attachment under State law in order to compel the payment of debts. (Davis v. C. C. C. & St. L. Ry. Co., 217 U. S., 157.) And the legislation of the States safeguarding life and property and promoting comfort and convenience within its jurisdiction may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. (Smith v. Alabama, 124 U. S., 465; Hennington v. Georgia, 163 U. S., 299; N. Y., N. H. & H. R. R. Co. v. New York, 165 U. S., 628; L. S. & M. S. Ry. Co. v. Ohio, 173 U. S., 285; Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S., 612; Missouri Pacific Ry. Co. v. Kansas, 216 U. S., 262.) It has also been held that the State has the power to forbid the consolidation of State railroad corporations with competing lines, although both may be interstate carriers and the prohibition may have a far-reaching effect upon interstate commerce. (Pearsall v. Great Northern Ry. Co., 161 U. S., 646, 677; Louisville & Nashville R. R. Co. v. Kentucky, 161 U. S., 677, 701, 702. See Northern Securities Co. v. United States, 193 U. S., 317, 348, 382.)

Again, it is manifest that when the legislation of the State is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it

is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State. It was an objection of this sort that was urged and overruled in Kidd v. Pearson (128 U. S., 1) to the law of Iowa prohibiting the manufacture and sale of liquor within the State, save for limited purposes. (See also Geer v. Connecticut, 161 U. S., 519, 534; Austin v. Tennessee, 179 U. S., 343; Capital City Dairy Co. v. Ohio, 183 U. S., 238, 245; Missouri Pacific Railway Co. v. Kansas, supra.) When, however, the State in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function. (Southern Railway Co. v. United States, supra; Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, supra.)

Within the State power, then, in the words of Chief Justice Marshall, is:

"That immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given

for a special purpose, or is clearly incidental to some power which is expressly given. (Gibbons v. Ogden, supra, pp. 203, 304.)

And, wherever as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the State power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.

(2) These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation.

The authority of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the State. * * *

It became a frequent practice for the States to create commissions as agencies of State supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. A summary of such legislation is given in Interstate Commerce Commission v. C., N. O. & T. P. Ry. Co. (167 U. S., 479, 495, 496). * * *

In Wabash, &c., Railway Co. v. Illinois, 118 U. S. 557, it was finally determined that the authority of the State did not extend to the regulation of charges for interstate transportation. There the State statute was aimed at discrimination. It was said to have been violated by the railroad company in the case of shipments from points within Illinois to the city of New York. The Sate court had construed the statute to be binding as to that part of the interstate haul which was within the State, although inoperative beyond the boundary. So applied, this court held the act to be invalid.

But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate. And in illustrating the extent of State power (id., p. 564) the court selected transportation across the State from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centers of commerce—the one on Lake Michigan and the others at the confluence of the Mississippi and Ohio Rivers and of the

sissippi and Missouri Rivers, respectively. After reviewing decisions holding State laws to be ineffective which imposed a direct burden upon interstate commerce, including the cases of the State Freight Tax (15 Wall., 232), all v. DeCuir (95 U. S. 485), Gloucester Ferry Co. v. Pennsylvania (114 U. S., 196), and Pickard v. Pullman Southern Car Co. (117 U. S., 34), the court emphasized the distinction with respect to the operation of the statute upon domestic transactions, saying: "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transporation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question." (Id., p. 577.)

The doctrine was thus fully established that the State could not prescribe interstate rates, but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied as every step by the assertion of this authority on the part of the States and its invariable recognition by this court. It has never been doubted that the State could, if it saw fit, build its own highways, canals, and railroads. (Railroad Company v. Maryland, 21 Wall., 456, 470, 471.) It could build railroads traversing the entire State and thus join its border cities and commercial centers by new highways of internal intercourse to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and by virtue of economic forces those engaged in interstate trade and transportation might find it necessary to make readjustments extending from market to market through a wide sphere of influence; but such action of the State would not for that reason be regarded as creating a direct restraint upon interstate commerce and as thus transcending the State power. Similarly, the authority of the State to prescribe what shall be reasonable charges of common carriers for intrastate transportation, unless it be limited by the exertion of the constitutional power of Congress, is State wide.

As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this

power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this State-wide authority con- the power in name while denying it in fact. It is to assert that trols the carrier and is not controlled by it, and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border, is foreign to our jurisprudence.

If this authority of the State is restricted it must be by virtue of the paramount power of Congress over interstate commerce and its instruments, and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power—that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province.

(3) When Congress, in the year 1887, enacted the act to regulate commerce (24 Stat. 379), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation in which the nature and extent of State legislation, including the commission plan, were fully reviewed. (S. Rept. 46, submitted Jan. 6, 1886, 49th Cong., 1st sess.) And it was the fact that beyond the bounds of State control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the act to regulate commerce there was inserted the following proviso:

Provided, however, That the provision of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly

within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

When in the year 1906 (act of June 29, 1906, ch. 3591, 34 Stat., 584) Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section 1 was reenacted. Again, in 1910, when the act was extended to embrace telegraph, telephone, and cable companies engaged in interstate business, the proviso was once more reenacted, with an additional clause, so as to exclude intrastate messages from the operation of the statute. (Act of June 18, 1910, ch. 309, 36 Stat., 545.) The proviso in its present form reads.

Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

There was thus excluded from the provisions of the act that transportation which was "wholly within one State," with the specified qualification where its subject was going to or coming from a foreign country. * * *

The question we have now before us, essentially, is whether after the passage of the interstate-commerce act, and its amendment, the State continued to possess the State-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however, phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.

Having regard to the terms of the Federal statute, the familiar range of State action at the time it was enacted, the continued exercise of State authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith. * * *

To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the State may be permitted to create an irreconcilable conflict with the authority of the Nation, or that through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution which, creating a nation, equipped it with an authority, supreme and plenary, to control national commerce and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing State action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress.

The interblending of operators in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminate, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made today which will hold tomorrow; that terminals, facilities, and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and can not be divided by State; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of State lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate

business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates can not be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

Second. Are the State's acts and orders confiscatory?

The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature or of the commission lawfully constituted by it as to matters within the province of either. (San Diego Land & Town Co. v. Jasper, 189 U. S., 439, 446.) The case falls within a well-defined category. Here we have a general schedule of rates involving the profitableness of the intrastate operations of the carrier taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws.

The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State

has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public. (Stone v. Farmers Loan & Trust Co., supra; Georgia Banking Co. v. Smith, 128 U. S., 174; Chicago, etc., Rwy. Co. v. Minnesota, supra; Reagan v. Farmers Loan & Trust Co., supra; St. Louis, etc., Rwy. Co. v. Gill, 156 U. S., 649, 652; Covington, etc., Turnpike Road Co. v. Sandford, 164 U. S., 578, 596, 597; Smyth v. Ames supra; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754; San Diego Land & Town Co. v. Jasper, supra; Stanislaus County v. San Joaquin Co., 192 U. S., 201, 215; Knoxville v. Knoxville Water Co, 212 U. S., 1, 17; Willcox v. Consolidated Gas Co., 212 U. S., 19, 41.)

In determining whether that right has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions.

(1) The basis of calculation is the "fair value of the property" used for the convenience of the public. (Smyth v. Ames, supra, p. 546.) Or, as it was put in San Diego Land & Town Co. v. National City, supra (p. 757):

What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.

(See also San Diego Land & Town Co. v. Jasper, supra; Willcox v. Consolidated Gas. Co., supra.)

(2) Th ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in Smyth v. Ames, supra (pp. 546-547):

In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just

and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

(3) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth case (id., p. 541.) The reason, as there stated, is that the State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier can not justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.

In the present cases the necessity of this segregation of the domestic business in determining values and results of operation was recognized by both parties. Voluminous testimony was taken before the master, and numerous exhibits containing data and calculations were submitted for the purpose of showing their respective estimates of the value of the entire property of the carriers in Minnesota, the amount of income and expense in that State, their theories of apportionment between the interstate and intrastate business, and their contentions as to the net return for intrastate transportation under the State rates. The multitude of facts which are involved make it impossible here to present a comprehensive review, even in a summary way. We must be content with a statement of the salient points and deal only with those matters which, after a careful consideration of the entire record, we regard as controlling our decision.

In each of the three cases (save in certain particulars, which we need not now mention, with respect to that of the Minneapolis & St. Louis Railroad Co.), the method adopted by the master was as follows:

The period taken for the purpose of testing the sufficiency of the rates was the fiscal year ending June 30, 1908. During this period all the rates in question, freight and passenger, were actually in force, with the exception of the commodity rates prescribed by the act of April 18, 1907, which had been enjoined. The amount of the reduction in the intrastate revenue which would have been caused by the application of the commodity rates is shown.

The master found the present value of the entire property of the carrier used in the public services in the State of Minnesota. This valuation was as of June 30, 1908, and was made on the basis of the cost of reproduction new. The master also made findings as to the original cost of construction and as to the present value on the basis of costs of reproduction new of the entire system of the carrier. The estimated value of the railroad property within the State was divided between the freight and passenger business upon the relation of the gross revenue derived from each. The part of the total value which was thus assigned to the freight business within the State was then divided between the interstate and intrastate freight business on the basis of gross revenue; and a similar division was made between the interstate and intrastate business of the property value assigned to the passenger department. In this way the master found the value of the property used in intrastate transportation, freight and passenger, upon which he computed the net return received by the carrier.

There was no substantial dispute as to the amount of the entire revenue assignable to the State or as to its division between interstate and intrastate business, as an examination of the transactions in which the revenue was obtained permitted the making of the requisite proportionments with reasonable certainty.

The master also ascertained the total expense incurred by the carrier within the State. This expense was first divided between freight and passenger business. Those items of cost which were directly incurred in each sort of business and not common to both were directly assigned, and such items were found to cover about 60 per cent of all expenses. The remaining items, those of common expense, were divided between the freight and passenger business upon the relation, as to most of them, of revenue train-miles, and as to the others, of revenue engine-miles.

Having thus ascertained the share of the expense within the State of the freight and passenger departments, respectively, it remained to divide that share in each case between the interstate and intrastate business. This apportionment was made, in the case of freight expense, upon what was termed an "equated ton-mile basis" and in the case of passenger expense upon an "equated passenger-mile basis." That is to say, the master concluded that the cost per ton-mile of doing the intrastate freight business was at least two and one-half times the cost per ton-mile of the interstate freight business, and thence he divided the total freight expense according to the relation of the interstate and intrastate ton-miles after the latter had been increased two and one-half times. In the case of the passenger expense he concluded that the cost per passenger-mile in the intrastate business was at least 15 per cent greater than that in the interstate business, and the total passenger expense was divided upon the relation of passenger-miles after increasing the intrastate passenger-miles 15 per cent.[1] By the use of equalizing factors the same result was obtained upon what was called an "equated revenue basis."[1]

[1] Equated revenue basis.—In the case of the Northern Pacific Co. it was found that the relation of freight revenue per ton per mile derived from the intrastate business, as compared with the interstate business, was as 1.4387 is to 1.0000. The relation of cost per ton per mile in the intrastate business, in proportion to revenue, to the cost per ton per mile in interstate business, in proportion to revenue, was then found to be as 1.7377 is to 1.0000, as follows:

$$\frac{250}{100} \div \frac{1.4387}{1.0000} = \frac{1.7377}{1.0000}$$

The actual intrastate freight revenue was multiplied by 1.7377 to obtain the equated revenue, and thus the same percentages were obtained as on the equated ton-mile basis, as follow:

Equated Revenue Basis. Freight.

	Actual revenue.	Equated revenue.
Intrastate	$1,555,342.92×1.7377	=$2,702,719.39= 25.362%
Interstate	7,953,734.41×1.	= 7,953,734.41= 74.638%
		10,656,453.80= 100%

The relation of revenue per passenger-mile intrastate and interstate was found to be as 1.0092 is to 1.0000, and thus the relation of cost per passenger-mile in relation to revenue was as 1.1395 is to 1.0000. The division was then made as follows:

Equated Revenue Basis. Passengers.

	Actual revenue.	Equated revenue.
Intrastate	$1,015,150.34×1.1395	=$1,156,763.81= 37.347%
Interstate	1,940,718.17×1.	= 1,940,718.17= 62.653%
		3,097,481.98=100%

The net profits of the interstate and intrastate businesses, respectively passenger and freight, were then found by deducting the apportionment share of expense from the apportioned share of revenue, and the rate per cent of the net profit upon the property value assigned to each sort of business was computed. The master concluded that the returns from intrastate transportation were unreasonably low and hence that the rates in question were confiscatory.

Values:—The items entering into the valuation are set forth in the margin.[1] * * *

[1]**Valuation—Northern Pacific.**

1. Lands for right of way, yards, and terminals	$21,024,562
2. Grading, clearing, and grubbing	12,331,541
3. Protection work, riprap, retaining walls	374,091
4. Tunnels	253,250
5. Crossties and switch ties	3,657,576
6. Ballast	1,960,969
7. Rails	5,645,307
8. Track fastenings	727,228
9. Switches, frogs, and railroad crossings	303,717
10. Track laying and surfacing	1,600,591
11. Bridges, trestles, and culverts	3,586,063
12. Track and bridge tools	28,073
13. Fences, cattle guards, and signs	471,609
14. Stockyards and appurtenances	37,098
15. Water stations	436,489
16. Coal stations	120,039
17. Stations, buildings, and fixtures	920,423
18. Miscellaneous buildings	1,054,874
19. Steam and electric power plants, gas plants	196,338
20. General repair shops	1,162,934
21. Shop machinery and tools	529,322
22. Engine houses, turntables, and cinder pits	1,026,346
23. Track scales	38,520
24. Docks and wharves	768,306
25. Interlocking plants and 26. Other signal apparatus	114,430
27. Telegraph and telephone lines	285,145
28½ General office furniture	73,654
29. Solidification of roadbed (absorbed in above).	
Total, 1 to 28	58,728,685
30. Engineering, superintendence, legal expenses, 4½ per cent 1 to 28	2,785,036
31. Locomotives	3,454,040
32. Passenger equipment	1,349,829
33. Freight-car equipment	7,519,722
34. Miscellaneous equipment	372,477
35. Marine equipment (none).	
Total, items 1 to 34	74,209,789

These are the results of the endeavor to apply the cost-of-reproduction method in determining the value of the right of way. It is at once apparent that, so far as the estimate rests upon a supposed compulsory feature of the acquisition, it can not be sustained. It is said that the company would be compelled to pay more than what is the normal market value of property in transactions between private parties; that it would lack the freedom they enjoy, and, in view of its needs, it would have to give a higher price. It is also said that this price would be in excess of the present market value of contiguous or similarly situated property. It might well be asked, who shall describe the conditions that would exist, or the exigencies of the hypothetical owners of the property, on the assumption that the railroad were removed? But, aside from this, it is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights and it can not be supposed that they would be disregarded.

It is urged that in this view the company would be bound to pay the "railway value" of the property. But supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its fair market value for all its available uses and purposes. (United States v. Chandler-Dunbar Water Power Co., decided May 26, 1913.) If in the case of any such owner his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. (Boom Co. v. Patterson, 98 U. S., 403; Shoemaker v. United States, 147 U.

36. Freight on construction material (absorbed).	
37. Contingencies, 5 per cent 1 to 34	3,710,479
38. Stores and supplies in Minnesota	2,658,976
39. Interest during construction, 4 per cent 2½ years, items 1 to 36	7,420,957
40. Interest in terminal properties, St. Paul depot, Duluth depot, Minnesota transfer	2,204,344
	90,204,545

S., 282; United States v. Chandler-Dunbar Co., supra.) But still the inquiry would be as to the fair market value of the property—as to what the owner had lost, and not what the taker had gained. (Boston Chamber of Commerce v. Boston, 217 U. S., 189, 195.) The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company, or of an enhanced value of virtue of the purposes for which it was taken, or of an increase over its fair market value, by reason of any added value supposed to result from its conbination with tracts acquired from others, so as to make it a part of a continuous railroad right of way held in one ownership. (United States v. Chandler-Dunbar Co., supra; Boston Chamber of Commerce v. Boston, supra.) There is no evidence before us from which the amount which would properly be allowable in such condemnation proceedings can be ascertained.

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way, if the railroad were not there, is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and can not be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonaably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest, and if it rests upon disputed questions

of fact the invalidating facts must be proved. And this is true of asserted value as of other facts.

The evidence in these cases demonstrates that the appraisements of the St. Paul and Minneapolis properties which were accepted by the master were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. Efforts to express the results in the terms of a theory of cost of reproduction fail, as naturally they must, to alter or obscure the essential character of the work undertaken and performed. Presented with an impossible hypothesis, and endeavoring to conform to it, the appraisers—men of ability and experience—were manifestly seeking to give their best judgment as to what the railroad right of way was worth. And doubtless it was believed that it might cost even more to acquire the property, if one attempted to buy into the cities as they now exist and all the difficulties that might be imagined as incident to such a "reproduction" were considered. The railroad right of way was conceived to be a property sui generis, "a large body of land in a continuous ownership," representing one of the "highest uses" of property and possessing an exceptional value. The estimates before us, as approved by the master, with his increase of 25 per cent in the case of the Duluth property, must be taken to be estimates of the "railway value" of the land; and whether or not this is conceived of as paid to other owners upon a hypothetical reacquisition of the property is not controlling when we come to the substantial question to be decided.

That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase all neighboring lands of like character devoted to other uses? If rates laid by competent authority, State or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void because they do not permit a return upon an increment so calculated?

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investments, if the value of its porperty be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if to be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation, and while under the guise of such regulation it may not be confiscated; it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value over the amount invested in it and beyond the value of similar property owned by others solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use and to make the public use destructive of the public right.

The increase sought for "railway value" in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which can not be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, can not properly extend beyond the fair average of the normal

market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called railway value of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequental damages must be disapproved; and in this view we also think it was error to add to the amount taken as the present value of the lands the further sums calculated on that value, which were embraced in the items of "engineering, superintendence, legal expenses," "contingencies," and "interest during construction." * * *

The master allowed the cost of reproduction new, without deduction for depreciation. * * *

It must be remembered that we are concerned with a charge of confiscation of property by the denial of a fair return for its use; and to determine the truth of the charge there is sought to be ascertained the present value of the property. The realization of the benefits of property must always depend in large degree on the ability and sagacity of those who employ it, but the appraisement is of an instrument of public service, as property, not of the skill of the users. And when particular physical items are estimated as worth so much new, if in fact they be depreciated, this amount should be found and allowed for. If this is not done the physical valuation is manifestly incomplete. And it must be regarded as incomplete in this case. (Knoxville v. Knoxville Water Co., 212 U. S., 1, 10.)

Apportionment of values.—As the rate of net return from the entire Minnesota business (interstate and intrastate) during the test year was 6.021 per cent on a valuation of $90,204,545, and would be greater if computed upon a less value, we are brought to the question whether the methods of apportionment adopted are so clearly appropriate and accurate as to require a finding of confiscation of property used in the intrastate business.

The apportionment of the value of the property, as found, between the interstate and intrastate business was made upon the basis of the gross revenue derived from each. This is a simple

method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court and its correctness is now challenged. Doubtless there may be cases where the facts would show confiscation so convincingly in any event, after full allowance for possible errors in computation, as to make negligible questions arising from the use of particular methods. But this case is not of that character. * * *

When rates are in controversy it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property; that is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments, respectively, the property exclusively used in each, comparable use units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the State rates, but this we can not assume.

It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory.

Apportionment of expenses.—As already stated, it was held in dividing the freight operating expenses that the costs of doing the intrastate freight business was two and one-half times that of doing the interstate freight business; that is to say, the division of expenses was made according to ton-miles, interstate and intrastate, after the intrastate ton-miles had been increased two and one-half times.

The substantial question is whether the proof established this extra cost with that degree of certainty which is requisite to support a decree invalidating the State rates. * * *

Our conclusions may be briefly stated. The statements of the complainants' witnesses as to the extra cost of intrastate busi-

ness, while entitled to respect as expression of opinion, manifestly involve wide and difficult generalization. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation and an effort to express in the terms of a definite relation, or ratio, what clearly could be accurately arrived at only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges, but of all the outlays of freight service including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains, respectively, and of an attribution of the proper share of the extra cost of local train service to the interstate traffic that uses it. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton-mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that on an issue of this character involving the constitutional validity of State action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost, as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared at least during test periods properly selected. It may be said that this would have been a very difficult matter, but the company having assailed the constitutionality of the State acts and orders was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion.

We need not separately review the findings with respect to the division of passenger expenses, as the same considerations are involved, with the distinction, however, that the extra cost attrib-

uted to the intrastate business is relatively small as compared with that charged to intrastate freight. And, in view of the conclusions reached on the controlling questions we have considered, we express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments.

For the purpose of determining whether the rates permit a fair return, the results of the entire interstate business must be taken into account. During the test year the entire revenue, as found, from the intrastate business passenger and freight, amounted to $2,897,912.26. All the rates in question were in force save the commodity rates, and it is further found that the loss that would have accrued in intrastate commodity business, by the application of the commodity rates which were under injunction, would have amounted to $21,493.67.

As neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown, and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill. * * *

What has already been said in the case of the Northern Pacific Co. with respect to estimates of value, the apportionment of value, the testimony as to the extra cost of doing the intrastate business and the division of expenses between interstate and intrastate business is equally applicable here.[1] In these respects there is no material distinction between the two cases and the same conclusion must be reached in both.

Minneapolis & St. Louis Railroad Co.— * * *

Without approving, therefore, the methods of calculation which have been adopted, but recognizing the peculiar situation of this road, and the undoubted effect of the rates in question upon its revenues, we are of the opinion that the decree, so far as it rests upon the confiscatory character of the rates as applied to this company, should be affirmed. In the desire, however, to prevent the possibility that the decree may operate injuriously in the future, we shall modify it by providing that the members of the railroad and warehouse commission and the attorney general of the State may apply at any time to the court by bill or otherwise, as they may be advised, for a further order or decree,

whenever it shall appear that, by reason of a change in circumstances, the rates fixed by the State's acts and orders are sufficient to yield to the company reasonable compensation for the services rendered.

The decrees in Nos. 291 and 292 are reversed and the cases remanded, with directions to dismiss the bills, respectively, without prejudice.

The decree in No. 293 is modified, as stated in the opinion, and as modified is affirmed.

WYMAN, PUBLIC SERVICE CORPORATIONS, 1401-1438.

But the power of the state over public service employments is not limited to its power to pass on the reasonableness of their acts after they have been established; the power to initiate action, to lay down rules in the first instance by way of regulating action, is fully recognized at common law and by the general practice of common law countries. Legislation of this sort has existed from time immemorial and is therefore always due process of law abstractly. It is a special branch of the general police power inherent in the legislative branch. * * * In common law countries * * * the legislature has fixed a maximum beyond which charges are unreasonable. Granting the power to regulate at all, the power to fix rates follows, since that is one means of regulation. The power of the common law to affect rates by providing that they must be reasonable is admitted; but this is itself a regulation. If, then, rates are and always have been regulated by law, that law, like any other, may be changed by the legislature, since no one has a vested interest in any rule of the common law. A legislative regulation of rates is therefore a mere instance of a change in the common law, which it is entirely within the power of the legislature to make; and in doing so it is not exercising judicial functions. * * * [1]

[1] Public regulation has generally taken the form of the regulation of the rates of public service companies, and the exercise of this power has been manifest in connection with the railways more than in connection with the other public service companies; but there is no reason why public regulation should be confined to this particular obligation of public callings. The principle of public regulation should apply to the obligation to furnish adequate facilities, to the obligation to refrain from discrimination, and to the obligation to

But while the power to fix rates may be exercised directly by the legislature, it is not, strictly speaking, a legislative power; but rather the so-called administrative function. * * * If is is necessary to find a place for the regulating power in one of the three departments into which government is commonly divided, it undoubtedly forms part of the executive department. The power is neither judicial nor legislative; it does not involve the power to make laws, or to interpret and apply them, but to aid in carrying the laws into effect. * * * It is often provided that the rate as fixed by regulating commission shall be taken as reasonable until the contrary is shown, or that the action of the commission shall be prima facie evidence of the reasonableness of the rates as found. * * * To whatever body the power of fixing rates may be confided, it is the function of the regular courts to pass upon the reasonableness of the rates thus established; and the courts cannot be deprived of this power. * * *

The general doctrine that a statute which is contrary to the Constitution is void is too well understood to be expatiated upon. If the statute which fixes or gives power to fix the rate is void, the rate does not exist in effect, and will be disregarded by the court. It is possible, however, to provide by statute that the rate shall be binding between the parties until declared void by the courts.

It has already been seen that the regulating power may be delegated to a subordinate body; and this is not unconstitutional as a delegation of legislative power. * * * The authority conferred on them relates merely to the administration in practice of the general rules laid down by the common law and by the legislature. * * * It is much more convenient for the legislature to confer on a subordinate administrative body the power to regulate than to do so itself. This has been done in England by placing the power in the Board of Trade, one of the executive or rather administrative departments of the government. In this country, the power has, in the last quarter cen-

serve all within the class of service, just as much as to the obligation to make reasonable charges. The private remedy by civial action, however, is generally sufficient so far as the obligation to serve all within the class of service is concerned. What is said above about rate regulation may be applied also to regulation of discrimination and facilities. Ed.

tury, very largely been referred to an administrative commission. * * * "The reasonableness of a rate changes with the changed condition of circumstances. * * * Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals." * * *

The legislature may by statute confer the power of fixing rates upon counties, cities, or villages, or any such bodies as constitute local governments; and the power so conferred may be exercised by the body named in accordance with the terms of the statute. The power is derived solely from the statute; and in the absence of such authority there is no power inherent in a municipal corporation to regulate the rates of public service companies. * * *

But any action by any subordinate body may be attacked in any court in which the question may come up as unconstituional. And as a practical matter in almost every case where such an attack is made, it may be based upon a provision of the constitution of the United States. That against impairing the obligation of contracts, depriving of equal protection of the laws, or taking property without due process of law. * * * If the rate order complained of in an unconstitutional statute is void, a suit to restrain a state official from enforcing it is not a suit to restrain him in acting under a state law, nor is it a suit against a state. A Federal court may therefore entertain such a suit. * * *

What constitutes interstate commerce? Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, in no respect affects the character of the transaction. * * * Even if the termini are within the same state it is interstate commerce if the goods are to move through another State during the transit. * * * When goods are shipped under a through bill of lading from a point in one State to a point in another, and are taken by a State common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous car-

riage or shipment within the meaning of the law. * * * In the case of carriage of passengers a similar interpretation will be made; assent by a carrier to the issue of a through ticket over several railroads constitutes an arrangement for continuous carriage. * * * If the transporting of goods or passengers to an ultimate destination in another State has begun, interstate commerce has begun, and no device to break up the transit into intrastate portions will affect its real nature. * * * And so if the goods are first billed to a point in the State of shipment, and at that point are rebilled to their ultimate destination in another State, without breaking of bulk, the whole constitutes a single carriage. * * * Though a carrier receives goods directed to a point outside of the State, he is not an interstate carrier if he is only to carry within the State, and there to deliver to an entirely independent succeeding carrier, with whom he has no common arrangement. So if the carrier receives within the State of destination goods brought from without the State by an entirely independent carrier, the receiving carrier is not engaged in interstate commerce. * * *

If certain cases only are examined it would seem that State statutes which restrict the conduct of interstate transportation in any substantial degree are unconstitutional, the absence of congressional regulation on the subject being held equivalent to a declaration that the matter should be left undisturbed. * * *[1] How far (may) the police power of the State be exercised by general legislation applying to the conduct of interstate commerce as well as to all things done within its borders? If the regulation is regarded as of vital importance to the State, the Federal courts may permit it to apply to interstate business, at least in the absence of congressional action. * * * Whatever doubts there may be as to the extent to which State regulation of interstate commerce may go in the absence of Federal regulation, there is no doubt as to the fate of State regulation of the conduct of interstate commerce which comes in conflict with Federal regulation. * * * But Congress cannot go so far in regulation of the conduct of interstate commerce as to invade the general police jurisdiction of the States as to action within their borders. (Cf. Employers' Liability Cases, 207, U. S. 463.) * * *

The regulation of interstate and foreign commerce is one of the principal powers confided by the Constsitution to the Congress of the nation. * * * There would therefore seem to be no doubt that Congress possesses the inherent right which every legislature having power has, either to fix rates itself or give to its commission power in the premises. (Thus far it has refused to fix rates itself, and at first it withheld from the commission the power to make schedules of rates—giving it power to give relief from unreasonable rates in particular cases where redress was asked—but in the latest legislation it has given the commission power to designate what the proper rate shall be henceforth. Railroad Commission Cases, 116 U. S. 307.)[1]

Impairing obligation of contract. A State may be disabled from fixing the rates of a railroad company by reason of some provision in its charter which constitutes a contract with the State. * * * Later action impairs the obligation of earlier contracts. But the contract must in reality be impaired by the later action. * * * A charter provision will not be construed as limiting the power of the legislature over rates unless there is an express provision to that effect. The presumption is against such limitations. * * * The ordinary clauses in railroad charters do not constitute a contract by the State not to regulate rates. Thus no such contract is created either by the grant of power to carry persons and property, or by the power to make by-laws, rules and regulations, or by the power to fix, regulate, and receive the tolls and charges. * * * A contract limiting the power over rates may be made between a city and a public service company. Before holding that such a contract exists, a court must first determine whether the city has power to make such a contract. Such a power may be conferred on a city. * * * There is, however, a constant tendency to find that the ordinance did not constitute a contract and that the power over rates continues. (Los Angeles v. Los Angeles City Water Co., 177 U. S. 558; Detroit v. Detroit Citizens St. Ry. Co., 184 U. S. 368; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65.) The contractual exemption from regulation may, it would seem, be lost by a company by long continued non-user as evidence of rescision of the contract, or by waiver. * * *

[1] But see Minnesota Rate Cases, supra.

The privilege of exemption is ordinarily personal with the grantee, and cannot be assigned in case of sale, lease or consolidation to another company which succeeds to its property and franchises. * * *

Confiscation of property. The question of rate regulation was first raised in the United States Supreme Court in the "Granger Cases," so-called. * * * The court, however, upheld the acts, on the ground that the property was affected with public interest, and the rate for the use of it was therefore a subject of legislation. * * * The action of the legislature was deemed binding at least as between private parties, without regard to the reasonableness of the rates. This extreme view was, however, soon abandoned. * * * In the Railroad Commission Cases, Mr. Chief Justice Waite said, "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation." In Chicago, etc., Ry. v. Minnesota, 134 U. S. 418, the court held for the first time that after a rate is fixed by legislature or commission it is necessarily within the power of the courts to declare the rate illegal if it is unreasonable (both as regards the company and as regards the public). "If the company is deprived of the power of charging reasonable rates for the use of its property, * * * in the absence of any investigation by judicial machinery, it is deprived of the lawful use of its property * * * of the property itself * * * without due process of law, and in violation of the Constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." In Reagan v. Farmers', etc. Co. 154 U. S. 362, the court reiterated this doctrine * * * Ever since the leading case of Smyth v. Ames, it has been generally recognized that when a rate is fixed so low as to impair the earning power of the corporation and render it impossible to obtain a fair return upon its investment, the rate operates a confiscation of the property. * * * On the other hand ever since the leading case of San Joaquin etc. Co. v. Stanislaus County, 192 U. S. 201, it has been recongnized that when a fair return is left the fact that the previous profits have been much reduced is immaterial. * * * It is apparently now constitutional law that a rate may be fixed on a single class of freight though it

would, if applied to all freight, produce less than a fair return to the railroad company.[1]

Due process of law. Statutes may be passed defining further the obligations of those engaged in public employment to serve all that apply in accordance with their requirements. But if these statutes go so far as to impose an absolute liability upon the proprietors to act at all events, they ask more than a State can require in view of the Fourteenth Amendment. Thus a statute which made it the unqualified duty of a railroad to furnish cars within a certain number of days after request, has been held unconstitutional by the United States Supreme Court on the ground that it would unjustifiably subject to its penalties a railroad which had reasonable excuses for its failure to act in the particular case. The only way in which a state court can save a statute of this sort is to say that its general language is to be construed in view of the common law obligation which it reenforces, which is subject to many excuses recognized as inherent in the obligation.

Although one who devotes himself to public employment submits himself to regulation therein to the extent of the calling he has professed, it would be in reality depriving him of his liberty and property to force him into a service which is in fact outside the employment he has undertaken. (Thus a railroad could not be compelled to build sidings to manufacturing plants.) * * * It is universally agreed that the legislature may exercise over public service companies to an unusual extent, its general regulating power (which is commonly called its police power) for the benefit of all concerned. * * * It is usually stated as a general principle that in the regulation of public employment there must be no discrimination. But this is subject to the principle that all regulation should be appropriate to the object in view. * * * In the Stock Yards Case 183 U. S. 79, the Supreme Court held unconstitutional a statute which regulated stock yards only of a certain size. In the commodities Case, 213 U. S. 366, the Supreme Court held constitutional a statute which forbade the transportation of certain commodities produced by the railroad in question.[2]

[1] See Minnesota Rate Cases, supra.

[2] The Right of the State to Fix Rates.
The general rule is that the several State legislatures have the power to regulate the rates or prices charged for the services ren-

dered or commodities sold by persons or corporations engaged in a business affected with a public interest or use.

The Constitutional Limitation of the Right of the State to regulate Rates.

A. If the rates fixed by a State are unreasonably low, they are obnoxious to the provisions of the Fourteenth Amendment.

(1) The fixing of rates, whether by a State Legislature or its agents, being a legislative or administrative, and not a judicial act, the courts, in reviewing a State rate, do not undertake to fix the rate itself or to say what rate would not be obnoxious to the Fourteenth Amendment; but simply inquire whether the rate fixed is, under all the circumstances of the case, so low as virtually to deprive the company of its property.

(2) The fixing of rates, whether by a State legislature or its agents, being the act of the State itself, it matters not that the agents have not properly exercised their powers.

(3) The fixing of rates, even by a State commission, being in the legal contemplation, no matter what the designation or powers of the commission, an administrative, legislative, or political act of the State itself, it further follows that the citizen who has been or will be deprived of his property through the operation of the rates thus fixed does not lose his right to a review by the courts simply because he may have been given full opportunity to present his case to the commissioners before action on their part.

(4) Depreciation—that is to say, the amount in excess of the annual expenditures for repairs, which in a properly managed enterprise must be annually applied or set aside to provide for the final renewal of the several parts of the plant—is a proper charge upon income.

(5) Where the complainant is bound by the common or the statute law to the performance of public services and duties, the price at which it may sell its commodities must clearly be high enough to enable it properly and satisfactorily to perform these public obligations, as well as to earn a reasonable profit on its plant.

(6) What sum or value is to be taken as the principal in determining whether the legislative rates will yield an income unreasonably low? We believe, however, that the answer will be found to be the sum representing the fair cash value at the time the rates are established of all the property then used by the Company in its business.

(7) The Mode of Valuation.

In view of the inapplicability of the simple test of market value resort must be had to several lines of evidence, no one of which is by itself conclusive of the ultimate problem, which is, what is the present value of the plant or property considered as a whole for the purposes of its actual use.

The company's plant cannot well in any event be worth more than the cost to procure a new plant of equal capacity and modern design.

(8) What constitutes a reasonable return?

It would seem that the just rate of compensation would be that determined by the percentage of net profit expected and commonly obtained in enterprises not affected with a public interest and involving about the same business risk. Doubtless the rates fixed by law for interest on money furnishes a test of which the investor cannot complain, although in many cases it might be oppressive to the general public.

If the rate has been fixed arbitrarily or inconsistently so as to discriminate against the complainant with regard to other persons or corporations similarly situated, it is obnoxious to that part of the Fourteenth Amendment which prohibits the States from denying to

c. Government Ownership.

Every man has a right, under reasonable regulations to pursue any one of the ordinary callings of life as long as his pursuit of them does not involve evil or danger to society. A law which granted to one man, or to a few men, the exclusive privilege of prosecuting such a trade or business would be a clear violation of the constitutional rights of those who had been thereby prohibited from engaging in the same business or occupation. When, however, the state bestows upon one or more persons the exclusive privilege of engaging in a business which but for this grant of privilege was not open to any one because it is not possible without governmental aid for any one to conduct it, whatever other constitutional objection may be raised to such a grant of monopoly, it is not objectionable because it has violated anybody's right to engage in the trade or business; for the trade or business

any person within their jurisdiction the equal protection of the laws, irrespective of the question whether it is in itself unreasonably low. Mathews, Jr. and W. G. Thompson in 15 Harvard L. Rev. 249-270. (abridged).

Interstate and Intrastate Commerce:—The following deductions may be made from the present state of the law in relation to charges for passengers and freight:

Interstate Transportation.

1. That the State, even in the absence of Federal legislation, cannot pass laws regulating interstate transportation.
2. That interstate transportation consists of the following:—
   a. Traffic taken up within a State and carried without or taken up without and carried within;
   b. Traffic taken through or across a State;
   c. Traffic on a road wholly within a State, but in transit from one State to another.
3. That it does not consist of:—
   a. Traffic taken up within a State and carried to another point therein;
   b. Traffic taken up within a State and carried to another point therein, but upon the journey transported through another State; that is, at least, so far as relates to State taxation of the intrastate portion of the gross receipts from such a carriage.

State Transportation.

1. That a State, in the matter of intrastate traffic, retains power of control over the same, unless said control has been bargained away by express grant.
2. That the presumption always is against such grant.
3. That a State, in the exercises of its power of control, is prohibited by the Constitution of the United States from reducing fares or freights below reasonable rates, and that the Federal courts, and not the State legislatures, are to be the final judges of what is reasonable. 9 Harv L. Rev. 344; 12 Harv. L. Rev. 278; 20 Harv. L. Rev. 652.

never existed before the grant of the monopoly, and, with the repeal of the statute which created it, would disappear all right to carry it on. * * *

I feel assured the reader who is conversant with the constitutional limitations of American governments will readily concede the soundness of these two propositions: First, if a business cannot be conducted by any one except under and with the aid of a grant by the government of some special privilege or franchise, the government may make of that business a more or less exclusive monopoly without violating anybody's natural right to carry it on. Secondly, if a business can be successfully conducted by a natural person or private corporation without government aid in the nature of a grant of a special franchise or privilege, there can be no prohibition of carrying on the business unless it is of such a nature that, if left open to individual enterprise, injury to the public cannot be avoided. If it be of such a nature, the business may be prohibited to the average person, and be converted into a more or less exclusive monopoly without unduly restricting the personal liberty of the citizen. * * *

Does not the grant of exclusive or monopolistic privileges to a few persons or private corporations, even in the apparently necessary and justifiable cases which I have just described, conflict with our constitutional declarations of the equality of all men before the law, and with the constitutional guaranty to all of equal privileges and immunities? Is it a sufficient answer to such a question to say that public interests forbid that any and every person who has the required capital should be permitted to construct a railroad, a street railway, a gas, electric light, water, telegraph, or telephone plant; that, on the other hand, these conveniences are public necessities, and that there is no alternative but to make more or less exclusive monopolies of them? Granted that individual capitalists cannot be allowed indiscriminately and without restraint to exercise the right of eminent domain, and to tear up the streets of a city in order to lay down conduits, pipes, and tracks; it does not necessarily follow that the right to do these things should be granted as a private monopoly to a few persons or corporations. If there was no other alternative to the creation of such private monopolies but the denial of these conveniences and necessities to the people, the law of overruling necessity would amply justify this patent and unmistakable violation of our constitutional guaranty of equal privileges

and immunities. But there is another and very feasible alternative. It is this: whatever business or industry cannot be left open to the free choice of all persons without favor or discrimination—subject only to reasonable regulations for the protection of the public and of individuals against fraud and other wrongs and dangers—should and can be made a government monopoly, instead of being granted to private individuals or corporations. A government monopoly certainly does not violate either the individual's right to carry on such a business or the Constitutional guaranties of equality and of equal privileges and immunities. * * * I feel confident that the courts would not find it either unreasonable or fantastical to hold that ownership of public utilities is an implied power of the government; implied from the fact that in no other way can the public needs be satisfied, without the violation of the fundamental principles of American constitutional law which are involved in the constitutional guaranties of equal privileges and immunities, and of equality, before the law. I can see no escape from the conclusion that these constitutional guaranties are most signally violated when the governments, national and state, grant to private capitalists the complete control of all of the means of intercourse and intercommunication between the people, even though the attempt is made to minimize the economic effect of this government policy by the regulation of these quasi-public corporations through the instrumentality of national and state commissions. * * * The principle of constitutional law which I have advocated in this paper need not be confined in its application to the indispensable arteries of the social organism, such as railroads, bridges, tunnels, the telegraph and telephone, etc. The principle seems to me to be applicable to the governmental control of any of the natural deposits of the earth, such as coal and iron or the forests. * * * This leads me to the concluding thought in advocacy of government ownership of public utilities. The railroads, telegraph lines, and other means of communication and transportation must be continuous and reliable in their operation, in order that they may prove efficient in the satisfaction of the growing demands of civilized life. Any interruption of their operation by the disputes of the private companies which control them with their employees over wages and terms of hiring, resulting in a strike interferes with the orderly prosecution of business in a way that the strike in a strictly private business cannot do beyond that particular

business. Whatever serious doubts may be entertained concerning the political propriety of such government monopolies, in these days of labor agitation and gigantic railroad and telegraph combinations, when a strike of railroad and telegraph employees may extend over the whole country, stop the wheels of commerce, and produce a widespread commercial paralysis as long as the strike continues, public opinion may not, after a thoughtful consideration of this constant menace to the public welfare, reject the proposition to convert the railroads and telegraph lines into government monopolies. Tiedeman in, 16 Harvard Law Review 476-490.[1]

[1] "It has never been doubted that the state could, if it saw fit, build its own highways, canals and railroads." Minnesota Rate Cases, supra.

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APPENDIX

AN ACT TO MAKE UNIFORM THE LAW OF BILLS OF LADING.

Be it enacted, etc., as follows:

PART I.
THE ISSUE OF BILLS OF LADING,

Section 1.—[BILLS GOVERNED BY THIS ACT.] Bills of Lading issued by any common carrier shall be governed by this Act.

Section 2.—[FORM OF BILLS. ESSENTIAL TERMS.] Every bill must embody within its written or printed terms—

(a) The date of its issue,

(b) The name of the person from whom the goods have been received,

(c) The place where the goods have been received,

(d) The place to which the goods are to be transported,

(e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person,

(f) A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in Section 23, and,

(g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

The provisions of this section are in accordance with business usage. The requirements of printing the words "order of" before the consignee's name. This is especially desirable in order to prevent the alteration of straight bills into negotiable bills. The only other provision of the section on which comment has been made is (f). The second clause in (f) has been added in this draft to meet objections made by representatives of the carriers.

Though it is desirable that all bills of lading shall conform to the rules here laid down, the essential point is that negotiable bills shall do so, and as to them only is a sanction imposed for failing to insert the terms required by the bill.

Section 3.—[FORM OF BILLS. WHAT TERMS MAY BE INSERTED.] A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to law or public policy, or

(b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

Much litigation has arisen over the point involved in 3 (b). The provision as drawn is in accordance with the weight of authority (6 Cyc. of Law 393) and is similar to the corresponding section of the Warehouse Receipts Act.

Section 4.—[DEFINITION OF NON-NEGOTIABLE OR STRAIGHT BILL.] A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill.

See note to the following section.

Section 5.—[DEFINITION OF NEGOTIABLE OR ORDER BILL.] A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill.

Any provision in such a bill that it is non-negotiable shall not affect its negotiability within the meaning of this act.

This Act makes a fundamental distinction throughout, between negotiable and non-negotiable bills. The former are the negotiable representatives of the goods, the latter merely evidence of the contract between the shipper and carrier. This distinction is clearly recognized in mercantile usage and by much legislation. To some extent it is also recognized by the courts independently of legislation. Negotiable bills are frequently called "order" bills.

Secton 6.—[NEGOTIABLE BILLS MUST NOT BE ISSUED IN SETS.] Negotiable bills issued in this State for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets.

If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts.

The issue of bills of lading in parts has often been condemned. It is a direct invitation to fraud in the case of negotiable bills, for one part is as much an original as another. Moreover, it is impossble to guard against the fraud, for it has been held that one who has contracted to buy goods and pay the price on transfer of the bill of lading must pay on having one of a set tendered him. He can not demand all (Sanders v. McLean, 11 Q. B. D. 327), though by so

doing alone can he be protected, for the carrier may deliver without liability to the holder who first presents a part. Glynn v. Dock Co., 7 App. Cas. 591.

Owing to the fixed practice of international carriers in regard to this matter, it has been thought more conservative to confine the requirements of this section to carriage within the United States.

Section 7.--[DUPLICATE NEGOTIABLE BILLS MUST BE SO MARKED.] When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to holder of the original bill.

The use of duplicate bills is common, and it is obvious that they should be so marked to avoid fraud or mistake. See Midland Bank v. Mo. Pac. Ry., 132 Mo. 492.

Section 8—[FAILURE TO MARK "NOT NEGOTIABLE."] A non-negotiable bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgements of an informal character.

Statutes in several States require the carrier to surrender all bills except those marked "not negotiable."

It seems desirable that a bill of lading should indicate very clearly on its face whether it is a negotiable or non-negotiable bill, in view of the marked differences in the legal effect of the two documents. Section 50 provides a criminal penalty for failure to observe this requirement.

Section 9.—[INSERTION OF NAME OF PERSON TO BE NOTIFIED.] The insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

This section is adopted with slight changes in working from House Bill 15,846 of the 1st session of the 59th Congress. The practice is common for a shipper of goods to take a bill to his own order that he may obtain the discount of a draft for the price, inserting also in the bill a request that the carrier notify the prospective buyer of the arrival of the goods, so that the latter may promptly pay the price, get the bill of lading, and remove the goods. Banks sometimes fear to discount a draft for the consignor when such a provision is inserted, questioning whether the prospective purchaser of the goods may not have a better right than one who buys the bill of lading either outright or as security.

As the person to be notified may not have even a contract right against the consignor, it seems best to remove any doubt as to the rights of one who purchases or lends money on such a bill.

Section 10.—[ACCEPTANCE OF BILL INDICATES ASSENT TO ITS TERMS.] Except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy.

This section deals with a question upon which there has been much litigation, and expresses the weight of authority, though there are many contrary decisions.

PART II.

OBLIGATIONS AND RIGHTS OF CARRIERS UPON THEIR BILLS OF LADING.

Section 11.—[OBLIGATION OF CARRIER TO DELIVER.] A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by—

(a) An offer in good faith to satisfy the carriers lien upon the goods,

(b) An offer in good faith to surrender the bill properly indorsed which was issued for the goods, if the bill is negotiable, and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgement that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal.

See the definition of holder in Section 53. The requirement of signature to an acknowledgment that the goods have been deliverd is perhaps not the law aside from statute, but, as the usage is reasonable, it is adopted.

Section 12.—[JUSTIFICATION OF CARRIER IN DELIVERING.] A carrier is justified in delivering the goods, subject to the provisions of the three following sections, to one who is

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a non-negotiable bill for the goods, or

(c) A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee.

This section gives the carrier a justification in some cases where he would not, under the preceding section, be bound to deliver, e. g., if a thief presented a negotiable bill properly indorsed, the carrier would be protected if he delivered the goods innocently.

Section 13.—[CARRIER'S LIABILITY FOR MISDELIVERY.] Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in sufficient season to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

This enacts the well-recognized law in regard to misdelivery generally, and also provides for the case where, owing to notice of the rights of others a delivery of the goods to the consignee is wrongful. It is probable that the existing law warrants the whole section.

See Southern Express Co. v. Dickson, 94 U. S., 549; 6 Cyc. 468, et seq.

Section 14.—[NEGOTIABLE BILLS MUST BE CANCELLED WHEN GOODS DELIVERED.] Except as provided in Section 27, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable to any one who for value and in good faith purchases such bill, for failure to deliver the goods to him, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto.

It is an obvious requirement of the mercantile use of negotiable bills of lading that the goods shall remain in the hands of the carrier as long as the bill is outstanding, and statutes similar in effect to this section are in force in some States. See also, as to warehousemen, Mohun, 2, 24, 355, 382, 538, 593.

The section does not apply to non-negotiable bills, because usage and mercantile necessity frequently require delivery in such cases without surrender of the receipt. See Forbes v. Boston & Lowell R. R., 133 Mass., 154; Litchfield Bank v. Elliott, 83 Minn., 469.

It is necessary to make the exception of compulsion by legal process, not only because of the only such compulsion contemplated by this Act, namely what is referred to under Section 43, but because the compulsion may occur in a state which has not passed the bill.

Section 15.—[NEGOTIABLE BILLS MUST BE CANCELLED OR MARKED WHEN PARTS OF GOODS DELIVERED.] Except as provided in Section 27, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable to any one who for value and in good faith purchases the bill, for failure to deliver all the goods specified in the bill, whether such purchaser acquired title to the bill before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

This follows in regard to partial deliveries the rule of Section 14.

Section 16.—[ALTERED BILLS.] Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Alteration of a document transferring title to property, or indicating ownership, can not destroy the vested title to the property. Wald's Pollock (3d ed.), p. 845, and cases cited. Accordingly, even though a bill is altered, the goods in the carriers possession belong to the same person they did before alteration, and though it would be possible to hold that the carrier's only relation to the goods became that of a bailee, bound only to turn over the goods on demand, but not bound to fulfill the contract of carriage, this seems an inconvenient result. No hardship is imposed upon the carrier if he is required to fulfill his obligation to carry the goods to their destination on the terms originally agreed upon.

This section is taken in substance from a condition in the uniform bill of lading assented to by most carriers.

Section 17.—[LOST OR DESTROYED BILLS.] Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier

or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

As in the case of all lost instruments (whether negotiable bills and notes or not) accidental destruction should not relieve the maker or diminish the rights of the holder. Accordingly the holder of a bill should be allowed to compel the delivery of the goods without surrender of the bill. This relief, however, can be given only under equitable conditions. The carrier can not be required to increase its risk because of the holder's carelessness or accident. Accordingly, a sufficient bond is required. The carrier will still remain liable on the original bill of lading if it should turn up in the hands of a bona fide purchaser, under Section 14, but will be able to recoup his liability against the bondsmen. As this draft imposes no penalty upon the carrier for failure to take up a negotiable bill of lading on delivery of the goods, other than making the carrier liable on such a bill which it has not taken up, there is nothing to prevent the carrier from making such arrangement as it deems satisfactory with the holder of a lost or destroyed bill, without requiring the legal proceeding provided for in this section.

Section 18.—[EFFECT OF DUPLICATE BILLS.] A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Duplicate bills of lading seem to have been somewhat confused by some courts, and perhaps by some business men, with bills of lading issued in sets, in which each part is an original. Banks appear sometimes to lend money on duplicate bills, and in First Bank of Batavia v. Ege, 109 N. Y., 120, at least the court seemed to treat the duplicate as if it were as good as the original. In Shaw v. United States, 101 U. S., 557, the duplicate was treated as of no more value than a copy. See also Midland Bank v. Mo. Pac. Ry. Co., 132 Mo., 492.

It is obvious that two separate bills representing the goods can not be permitted. The duplicate, therefore, must not represent the goods. It should, however, be conclusive upon the carrier that there is an original of the same tenor.

Section 19.—[CARRIER CAN NOT SET UP TITLE IN HIMSELF.] No title or right to the possession of goods, on the part of the carrier asserted by him for his own benefit, shall excuse the carrier from liability for refusing to deliver the goods according to the terms of the bill, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment or from the carrier's lien.

This states the common law as to bailees generally. 3 Am. & Eng. Encyc. of Law, 759.

Section 20.—[INTERPLEADER OF ADVERSE CLAIMANTS.] If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defence to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate.

The case of Crawshay v. Thornton, 2 Myl. & C. 1, unfortunately held that interpleader was not a proper remedy in such a case. It is, however, the only adequate remedy, and is probably generally allowed in this country. 3 Am. & Eng. Encyc. of Law, 762.

Section 21.—[CARRIER HAS REASONABLE TIME TO DETERMINE VALIDITY OF CLAIMS.] If some one other than the consignee or person in possession of the bill, has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

It seems obviously proper that the carrier should be protected for such brief period as may be necessary to enable him to determine the rights of the claimants.

Section 22.—[ADVERSE TITLE IS NO DEFENSE, EXCEPT AS ABOVE PROVIDED.] Except as provided in the two preceding sections and in Section 12, no right or title of a third person unless enforced by legal process shall be a defence to an action brought by the consignee or person claiming under him against the carrier for failure to deliver the goods on demand.

Except as qualified by the preceding sections, the common law doctrine is here stated that a bailee can not set up the title of a third person as an excuse for failure to deliver goods. See 3 Am. & Eng. Encyc. of Law, 758.

Section 23.—[LIABILITY FOR NON-EXISTENCE OR MISDESCRIPTION.] If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to

(a) The consignee named in a non-negotiable bill, or

(b) The holder of a negotiable bill,

Who are given value in good faith relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statements of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages containing the goods are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or .words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement was true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill.

This section, perhaps imposes on the carrier a stricter rule than that generally in force in this country in that it makes a carrier liable for an innocent misdescription of the goods. See Hale v. Milwaukee Dock Co., 23 Wis., 276; but as the carrier can readily protect himself by inserting in the bill only what he knows, namely, the marks on the packages or the statements of the shipper regarding them could be permitted while the negotiable document was outasserts. The section also charges the carrier for the improper conduct of an employee in issuing a bill when goods have not been received.

Section 24.—[ATTACHMENT OR LEVY UPON GOODS FOR WHICH A NEGOTIABLE BILL HAS BEEN ISSUED.] If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

If the mercantile theory of documents of title, such as bills of lading and warehouse receipts, were carried to its logical extent, no attachment of the goods represented by the document or levy upon them could be permitted while the negotiable document was outstanding. For the mercantile theory proceeds upon the assumption that a negotiable document of title represents the goods and may be safely dealt with on that assumption. For one and the same reason it is not admissible for the bailee to deliver the goods without taking up an outstanding negotiable receipt for them, and for the law to allow attachment or levy upon the goods, regardless of outstanding

negotiable documents. For a similar reason the maker of negotiable notes is protected from garnishment; in most states by absolutely disallowing such garnishment and in other states by making any garnishment subject to the rights of even a subsequent purchaser for value before maturity of the paper. Likewise by statute in some states an attachment of stock is postponed to a subsequent purchaser of the stock certificate Clews v. Friedman, 180 Mass., 556. So in the case of carriers, some protection against garnishment has been given. In most states, if the goods are actually in transit the carrier can not be garnished, 14 Am. & Eng. Encyc. of Law, 810. A transfer of the bill of lading prevails over a subsequent attachment Mather v. Gordon, 59 At. Rep., 424 (Conn); Robert C. White Co. v. Chicago & C. R. Co., 87 Mo. App., 330; Union Bank v. Rowan, 23 S. C., 339; and in Peters v. Elliott, 78 Ill., 321, it was held, that an attaching creditor of a consignor was postponed to one who bought the bill of lading subsequently.

It was thought best in this Act not to take the extreme position that no attachment, garnishment or levy could be made on property for which a negotiable bill was outstanding, but to cover the essential practical point by making it a condition of the validity of such seizure that the negotiation of the bill be enjoined or the document impounded. The following section expressly gives the court full power to aid, by injunction and otherwise, a creditor seeking to get at a negotiable bill and the property covered thereby.

Section 25.—[CREDITOR'S REMEDIES TO REACH NEGOTIABLE BILLS.] A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof, as is allowed at law or in equity, in regard to property which can not readily be attached or levied upon by ordinary legal process.

As the right of legal garnishment of bailed property is limited by Section 24, the creditor is given by this section such rights as are included under the head of bills of equitable attachment or in aid of execution.

Section 26.—[NEGOTIABLE BILL MUST STATE CHARGES FOR WHICH LIEN IS CLAIMED.] If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

This section is obviously requisite for the credit of negotiable bills, and is part of the general plan to make such bills indicate as clearly as possible on their face for what they stand.

Section 27.—[EFFECT OF SALE.] After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier

shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

This section necessarily qualifies the right of a purchaser to a negotiable bill; such a purchaser may ordinarily assume that if the document was issued to the owner of goods and has been legally transferred to the purchaser, the latter will get a good title, but this assumption must be qualified by the chance referred to in this section. The age of the bill will, however, ordinarily give warning.

PART III.
NEGOTIATION AND TRANSFER OF BILLS.

Section 28.—NEGOTIATION OF NEGOTIABLE BILLS BY DELIVERY.] A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

This section should be read in connection with the following four sections. Thus, Section, 29, provides as to the methods of negotiating order bills. Section 31 provides as to what persons may make effective negotiation, and Section 32 provides what rights are acquired by a purchaser if such a person, as is described in Section 31, negotiates the bill in the manner permitted by Sections 28 and 29. In allowing negotiation by delivery of a bill indorsed in blank, the draft follows the rule in regard to bills and notes, which is that also applied by mercantile usage to bills of lading.

Section 29.—[NEGOTIATION OF NEGOTIABLE BILLS BY INDORSEMENT.] A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

As the preceding section adopted the rule of bills and notes as to negotiation by delivery, so this section similarly adopts a rule in regard to negotiation by indorsement.

Section 30.—[TRANSFER OF BILLS.] A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby.

A non-negotiable bill can not be negotiated, and the indorsement of such a bill gives the transferee no additional right.

As provision is made in several sections for the negotiation of bills, so it is also provided what the effect is of the transfer of bills including the transfer of non-negotiable bills and of negotiable bills without complying with such formalities as are necessary to make an effective negotiation of them. There is no section providing as to who may transfer a bill, corresponding to Section 31 as to who may

negotiate a bill, since under Section 33, where a bill is transferred, but not negotiated, the transferee can in no case acquire a greater right than the transferor had. Whoever, therefore, transfers a bill, can give such a right and no more.

Section 31.—[WHO MAY NEGOTIATE A BILL.] A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

This section and the following are of fundamental importance to the mercantile community. They state familiar law in regard to bills and notes, and there is authority for applying the same rules to bills of lading, both in the statutes making bills of lading negotiable and in decisions of courts recognizing mercantile custom. Commercial Bank v. Armsby Co., 120 Ga., 74; Pollard v. Reardon, 65 Fed., 848 (C. C. A.); Munroe v. Philadelphia Warehouse Co., 75 Fed., 545; Tiedeman v. Knox 53 Md. 612; Hardie v. R. R. Co. 118 La. 254; Schuerman v. Monarch Fruit Co. (March 1, 1909),——La.——S. C. 48 Southern Rep. 647. For German Law see Handelsgesetzbuch secs. 363, 426, 442, 446-448. This section is also in harmony with the views expressed by the American Bar Association. See Vol. 33, Reports American Bar Association pp. 24, 25 and 506, 507.

Section 32.—[RIGHTS OF PERSON TO WHOM A BILL HAS BEEN NEGOTIATED.] A person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Even more than the preceding section, this section arises sharply the issue between what may be called the mercantile theory of bills of lading and the common law theory. The common law theory may be stated in these words: The bill of lading is a symbol of the property. Delivery of the bill of lading has the same effect as delivery of the property, but as property may be delivered without transferring title and without estopping the owner from asserting his title against one who has bought in good faith from the possessor, so in case of a bill of lading the original owner of the goods may always show what the real nature of the transaction was, even against a bona fide purchaser. Merchants and bankers, on the other hand, regard the bill of lading as a representation of title as well as a symbol of possession. See the decisions cited in the note to the preceding section as to the mercantile theory, and compare recent expressions in The Carlos F. Roses, 177 U. S., 655, 665; Washburn-Crosby Co. v. Boston & Albany R. R. Co., 180 Mass., 252, 257.

This Act adopts the mercantile theory in providing that the person to whom the bill has been duly negotiated, acquires not only the title of the person who negotiated the bill, but also such title as the consignor and consignee had. That is, the purchaser may regard the form of the bill as a representation on the part of the consignor that the consignee was the owner of the goods.

Subsection (b) provides that the person to whom the bill is negotiated shall succeed to the contract rights under the bill of lading as well as the property rights.

Section 33.—[RIGHTS OF PERSON TO WHOM A BILL HAS BEEN TRANSFERRED.] A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the bill is non-negotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a non-negotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods.

So far as the non-negotiable bill is concerned, this section states the rights at common law of a purchaser of bailed goods. The purchaser, therefore, acquires nothing by the bill of lading except evidence. In case of a negotiable bill, the purchaser has the further right given by the next section.

Section 34.—[TRANSFER OF NEGOTIABLE BILL WITHOUT INDORSEMENT.] Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

This follows the analogy of bills and notes. Crawford's Negotiable Instrument Law, Section 79.

Section 35.—[WARRANTIES ON SALE OF BILL.] A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

(a) That the bill is genuine,

(b) That he has a legal right to transfer it,

(c) That he has knowledge of no fact which would impair the validity or worth of the bill, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the asignor shall not exceed the amount of the claim.

The clause in the first paragraph beginning "including" was inserted to avoid any possible misapprehension as to the scope of Section 37.

This section except (d) follows the Negotiable Instrument Law, Crawford, § 115. (d) it is believed states the existing law.

Section 36.—[INDORSER NOT A GUARANTOR.] The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Mercantile usage in regard to warehouse receipts and bills of lading differs from that in regard to bills and notes in the matter to which this section relates. It states the existing law even where statutes have made warehouse receipts and bills of lading negotiable. Shaw v. Railroad Co., 101 U. S. 557; Mida v. Geissmann, 17 Ill. App. 207.

Section 37.—[NO WARRANTY IMPLIED FROM ACCEPTING PAYMENT OF A DEBT.] A mortgagee or pledgee, or other holder for security of a bill who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described.

There are several English decisions to the effect that the holder of a bill of exchange having a forced bill of lading as security is not liable to refund payment of the draft if he receives payment from the drawee. To the same effect are Hoffman v. Bank, 12 Wall., 181; Goetz v. Bank, 119 U. S., 551, and see Daniel on Neg. Inst. § § 174, 175.

In Landa v. Lattin, 19 Tex. Civ. App., 246, however, without referring to these authorities, the court went to the extreme of holding that the holder of a bill of lading taken for security on the discount of a draft succeeded to all the liabilities of his transferor, the seller

of the goods, and was to be regarded as warranting the quality of the goods to the same extent as the seller. This decision, though opposed to both authority and reason, was soon followed in Finch v. Gregg, 126 N. C., 176, and Searles v. Smith Co. 80 Miss., 688. A contrary decision was, however rendered in Tolerton-Stetson Co. v. Anglo-California Bank, 112 Ia., 706, and more recently Landa v. Lattin has been overruled in its own state. Blaisdell Co. v. Citizens Nat. Bank, 96 Tex., 626. Nevertheless it has been followed subsequently in Alabama. Haas v. Citizens' Nat. Bank, 144 Ala., 562.

Section 38.—[WHEN NEGOTIATION NOT IMPAIRED BY FRAUD, ACCIDENT, MISTAKE, DURESS OR CONVERSION.] The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, given paid value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress of conversion.

This section merely elaborates for the sake of clearness certain cases within the terms of Section 31.

Section 39.—[SUBSEQUENT NEGOTIATION.] Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such good, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

This is copied from Section 25 (1) of the English Sale of Goods Act, where it applies to all sales of goods. It is of special importance in the case of negotiable documents of title.

Section 40.—[FORM OF THE BILL AS INDICATING RIGHTS OF BUYER AND SELLER.] Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except

for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(c) Where by the bill the goods are deliverable to the order of the buyer or of his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is endorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

It has for centuries been recognized that the form of the bill of lading was evidence of intent on the part of the seller to transfer or retain title. If the seller names himself not only as consignor, but also as consignee of the goods, the carrier is bailee for him and is his agent, in holding possession. It is also a fair presumption that title remains in the seller, as he is entitled to possession. On the other hand, if the seller names the buyer as consignee, the contract of the carrier is to deliver to the buyer; the carrier's possession is, therefore, for the buyer and with the right to possession presumably title also goes. The rules stated in this section are believed to be in accordance with at least the presumptions recognized by existing law. The difficulty with the law as it now exists is, many courts seem disposed to say that an intention contrary to that which the form of the bill indicates, may be shown even as against third persons. See Sales Act, sec. 20.

Section 41.—[DEMAND, PRESENTATION OR SIGHT DRAFT MUST BE PAID, BUT DRAFT ON MORE THAN THREE DAYS TIME MERELY ACCEPTED BEFORE BUYER IS ENTITLED TO THE ACCOMPANYING BILL.] Where the seller of goods draws on the buyer for the price of the goods nd transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not) that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order.

This section is inserted for the first time in this draft. It covers a question that has caused some litigation. See Williston on Sales, Section 290.

Drafts on demand, presentation or sight, are assimilated by section 7 of the Uniform Negotiable Instruments Act. See Brannan Negotiable Instruments (1908) pp. 4 and 43.

Section 42.—[NEGOTIATION DEFEATS VENDOR'S LIEN.] Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

This section is covered by the Uniform Sales Act Sections 59 (2) and 62. It was decided in Newhall v. Central Pacific R. R., 51 Cal., 345, that a railroad redelivering goods to the seller on receiving notice of stoppage in transitu was liable to a purchaser of a bill of lading issued for the goods, though the purchase was subsequent to the notice to stop. The case has been somewhat criticised by text-writers, but there are no decisions against it, and it seems clearly better to protect the innocent purchaser of the bill than the seller who has voluntarily taken part in the issue of the bill. If the purchaser of the bill is to be protected, the carrier must necessarily be allowed to protect himself by refusing to deliver the goods until the bill of lading is surrendered.

Section 43.—[WHEN RIGHTS AND REMEDIES UNDER MORTGAGES AND LIENS ARE NOT LIMITED.] Nothing in this Act shall limit the rights and remedies of a mortgagee or lienholder whose mortgage or lien on goods prior to the time of their delivery to the carrier would be valid, apart from this Act, as against one who for value and in good faith purchases from the owner the goods which are subject to the mortgage or lien and obtains possession of them.

This section is declaratory and is intended to make perfectly clear that neither Section 24 nor Section 42, nor any other section is intended to be subversive of established laws governing chattel mortgages and liens on goods prior to the time of their delivery to the carrier.

PART IV.

CRIMINAL OFFENCES.

Section 44.—[ISSUE OF BILL FOR GOODS NOT RECEIVED.] Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of goods for which such bill is issued have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished for each offence by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

To insure the fundamental basis on which the value of negotiable bills of lading must rest, it is necessary to punish criminally misrepresentation or fraud in regard to the existence of the goods behind the bill of lading. Other obvious frauds are aimed at by six following sections.

Section 45.—[ISSUE OF BILL CONTAINING FALSE STATEMENT.] Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See note to Section 44.

Section 46.—[ISSUE OF DUPLICATE BILLS NOT SO MARKED.] Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of Section 7, knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncancelled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

See note to Section 44.

Section 47.—[NEGOTIATION OF BILL FOR MORTGAGED GOODS.] Any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offence by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See note to Section 44.

Section 48.—[NEGOTIATION OF BILL WHEN GOODS ARE NOT IN CARRIER'S POSSESSION.] Any person who with intent to defraud negotiates or transfers for value a bill knowing that

any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

See note to Section 44.

Section 49.—[INDUCING CARRIER TO ISSUE BILL WHEN GOODS HAVE NOT BEEN RECEIVED.] Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or are not under its control, by inducing an officer, agent, or servant of such carrier, or are under its control, goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

See note to Section 44.

Section 50.—[ISSUE OF NON-NEGOTIABLE BILL NOT SO MARKED.] Any person who with intent to defraud issues or aids in issuing a non-negotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both.

See note to Section 44.

PART V.
INTERPRETATION.

Section 51.—[RULE FOR CASES NOT PROVIDED FOR IN THIS ACT.] In any case not provided for in this Act, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, accident, mistake, bankruptcy, or other invalidating cause, shall govern.

A similar provision is commonly inserted when an attempt is made to reduce to statutory form any topic of the law as in the Negotiable Instrument Law, the Sales Act and Warehouse Receipts Act.

Section 52.—[INTERPRETATION SHALL GIVE EFFECT TO PURPOSE OF UNIFORMITY.] This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

This section is taken from the Sales Act and Warehouse Receipts Act, in order to induce the courts to consider not primarily the law previously existing in one State, but that existing in the States generally, in construing the present bill.

Although the Negotiable Instruments Act does not contain this section yet the courts of last resort have rightly applied this rule, See Brannan on Negotiable Instruments Law (1908 page 1, note 2, and cases there cited and Crawford, Neg. I. L. (3rd. ed. 1908) p. 3.

Section 53.—[DEFINITIONS.] (1) In this Act, unless the context or subject matter otherwise requires—

"Action" includes counter claim, set-off, and suit in equity.

"Bill" means bill of lading.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership of two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith," within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

The only definitions in this section requiring comment are the last two. The definition of value follows the Negotiable Instrument Law, the Uniform Sales Act, the Uniform Warehouse Receipts Act, and applies the same doctrine to bills of lading. While weight of authority, aside from statute, may have been opposed to quite so broad a definition of value in transactions other than bills and notes, some courts at least have consistently applied the same rule to all transactions, and so far as bills of lading are concerned, at least, it seems unadvisable to make a distinction.

The definition of good faith here given is that recognized by the great weight of authority in the law of bills and notes, and the rule in equity generally seems to be the same.

Section 54.—[ACT DOES NOT APPLY TO EXISTING BILLS.] The provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

Section 55.—[INCONSISTENT LEGISLATION REPEALED.] All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Section 56.—[TIME WHEN THE ACT TAKES EFFECT.] This Act shall take effect on the ———— day of ————, one thousand nine hundred and ————.

Section 57.—[NAME OF ACT.] This Act may be cited as the Uniform Bills of Lading Act.

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...er or party in possession),
...session shall not be liable for loss,
... occurring while the property is stopped and
... transit upon request of the shipper, owner, or party

reasonable charge for
The carrier may make
tion of any vessel or car, or for
car has been held forty-eight hours (exclusive